IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-909

CITY OF CINCINNATI, OHIO,

*Petitioner,*

*v.*

PUBLIC UTILITIES COMMISSION OF OHIO,
CINCINNATI GAS & ELECTRIC COMPANY,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Cases:*



*Statutes:*







*Miscellaneous:*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The City of Cincinnati, Ohio (Cincinnati) petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio entered on July 19, 1978.[1]

## OPINIONS BELOW

The Opinion of the Supreme Court of Ohio of July 19, 1978, is reported at 55 Ohio St.2d 168, 378 N.E. 2d 729. The official and unofficial reports of the opinion are

[1] Following the entry of judgment on July 19, 1978, Cincinnati filed a timely motion for rehearing. On September 7, 1978, the court below denied rehearing (App. C).

printed as Appendix A and Appendix B, respectively, to this petition. The order denying rehearing of the Supreme Court of Ohio is unreported and is printed as Appendix C to this petition.

The Opinions and Orders of the Public Utilities Commission of Ohio (PUCO), issued on July 23, 1976, and September 8, 1976, are unreported, and are printed as Appendix D and Appendix E, respectively, to this petition. The entries of the PUCO denying timely applications for rehearing, issued on September 15, 1976, and November 2, 1976, are unreported, and are printed as Appendix F and Appendix G, respectively, to this petition.

## JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 19, 1978, and the order denying rehearing of that judgment was entered on September 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

## QUESTIONS PRESENTED

(1) Whether the severance of two cases from a third case, which cases had been consolidated for hearing by the PUCO on its own motion because they contained common issues of law and fact, prior to the conclusion of the consolidated hearing and issuance of a decision in the severed cases which disposed of the issues common to three cases without consideration of all of the evidence relating to the common issues, resulted in the denial of a fair hearing to petitioner in violation of the Due Process Clause of the Fourteenth Amendment?[2]

(2) If certiorari be granted, Cincinnati reserves the right to address the following question: "Whether the *ex parte* settlement-

[footnote continued]



## CONSTITUTIONAL PROVISION, STATUTE, AND REGULATORY RULE INVOLVED

The pertinent provisions of the Fourteenth Amendment to the Constitution of the United States of America, the Revised Code of Ohio (Ohio R.C. 4909.18-19), and Rules of Practice (Rule 1.04) of the Commission are set out in Appendix H to this petition.

## STATEMENT

The proceedings before the PUCO involved three applications for gas rate increases filed by Cincinnati Gas & Electric Company (CG&E). The three applications embraced CG&E's total gas service area and presented common (identical) issues for decision.

One of the applications, docketed as Case No. 74-581-GA-AIR (Case No. 581), proposed an annual increase in gas rates of $9,447,656 to CG&E's customers located in unincorporated areas of its service territory and to customers located within incorporated municipalities whose rates were not established by municipal ordinances.

A second application, docketed as Case No. 75-205-GA-AIR (Case No. 205), proposed an annual increase in gas rates of $9,649,430 to Cincinnati and to other CG&E customers located in the City of Cincinnati.

The third application, docketed as Case No. 75-641-GA-AIR (Case No. 641) proposed an annual increase in gas rates of $7,010,000 to customers in 63 specified municipalities.

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negotiations between the PUCO Staff and the Cincinnati Gas & Electric Company, and agreement by them to settle the issues in all three cases, denied Cincinnati a fair hearing in violation of the Due Process Clause of the Fourteenth Amendment?

For the first time in its history, CG&E proposed that uniform (identical) rates be established in the service areas involved in the three applications.[3]

Some time after the third application was filed, CG&E filed a motion in Case No. 581 to increase the proposed increase in rates in that case by 16 cents per Mcf, or $5,128,000 annually, to compensate CG&E "for the erosion in earnings due to known changes in operations, gas supply, and expenses of [CG&E] subsequent to the twelve month period ended December 31, 1974" – the test period.

Three months later, CG&E superseded this motion by identical motions filed in Cases No. 205 and 641. CG&E now proposed to recover the earnings erosion uniformly from Cases No. 581, 205 and 641 through a uniform surcharge of 9 cents per Mcf to be applied to each step of each rate schedule in the three cases that would produce $7,949,466 annually, although CG&E freely conceded in these motions that the major cause of the earnings erosion was reduced sales to its customers in Case No. 581.[4]

[3] As originally filed uniform rates were not proposed by CG&E in Case No. 581. Simultaneously with the filing of Case No. 205, CG&E amended its application in Case No. 581 to propose uniform rates for all customer classes regardless of differences in the cost of serving customers in different geographic locations and regardless of the geographic location of the customers. The effect of the uniform rate proposal was to reduce the rate increase applied for in Case No. 581 by $3,030,348, to $6,417,308. *Amendment to Application in Case No. 581*, pp. 2, 3, 4.

[4] CG&E explained that its proposal to recover the earnings erosion from all customers uniformly was consistent with its proposal for uniform rates throughout its service territory. (R Vol. IV, 24)



By entry of June 9, 1976, the PUCO, on its own motion, consolidated the three cases "for purposes of public hearing" because the applications presented "common issues of fact and law" and scheduled a public hearing on the issues to commence on July 12, 1976. (App. I, p. 101a, Findings (12) and (13)).

Cincinnati had been granted intervention in Case No. 205 prior to the hearing and by entering its appearance at the commencement of the hearing in each of the three consolidated cases, Cincinnati became a party to Cases No. 581 and 641 in accordance with PUCO's Rules of Practice (Rule 1.04, App. H, p. 97a-98a) and the PUCO's entry of June 9, 1976 (App. I, p. 100a, Finding (6)).[5] The opening session of the hearing on July 12, 1976 was confined to the entry of appearances, opening statements, statements by the consuming public, and procedural matters.

The taking of evidence began on July 13, 1976. At the outset of that session of the hearing, PUCO counsel advised the Hearing Examiner that PUCO Staff and CG&E had reached an agreement for settlement of the three cases and that the agreement would be submitted for the record the following day (R. Vol. II, 2-3). PUCO counsel, also, stated that the PUCO Staff had agreed that CG&E was entitled to 92 percent of the proposed increases in each of the consolidated cases, to the assessment of the earnings erosion adjustment uniformly against the three

[5] Rule 1.04 provides four methods by which a municipal corporation, such as Cincinnati, may become a party to a PUCO proceeding. One of the four methods is the entry of an appearance at the hearing. In Finding (6) of the entry of June 9, 1976 in Cases No. 205 and 641 (App. I, p. 100a), the PUCO conceded that Rule 1.04 "provides that one may become a party to this proceeding by appearing at the hearing."

cases, and to the establishment of uniform rates throughout CG&E's service territory (R. Vol. II, 3; R. Vol. III, 40-49). PUCO counsel further advised that Cincinnati objected to the agreement and had declined to join in it.[6] Because of Cincinnati's objection, PUCO counsel stated that a separate agreement would be submitted for Case No. 205 and that a motion would be made to sever Cases No. 581 and 641 from Case No. 205.

When the agreements between PUCO Staff and CG&E were submitted for the record on July 14, 1976 (R. Vol. III, 40-49), Cincinnati's counsel objected to the agreements, to their admission in evidence, to severance of Cases No. 581 and 641 from Case No. 205, and to a decision in Cases No. 581 and 641 by the PUCO of the issues common to all three cases without consideration of the evidence adduced by Cincinnati through its own witnesses and through cross-examination. Cincinnati, through its counsel, asserted that such a decision of the identical issues in Cases No. 581 and 641 would deprive Cincinnati of its right to a fair hearing in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution (R. Vol. III, 49-54, printed as App. J to this petition).

The Hearing Examiner overruled Cincinnati's objections and referred the agreement in Cases No. 581 and 641 and the motion to sever to the PUCO. The "hearing" in Case No. 205 continued to a conclusion on July 22,

[6]The agreement between PUCO Staff and CG&E was the result of *ex parte* negotiations prior to the hearing of which negotiations Cincinnati was kept in the dark. Cincinnati was informed of the negotiations *only* after an agreement was reached between PUCO Staff and CG&E. Only then was Cincinnati apprised of the negotiations and invited to join in the agreement.



1976 and a schedule for the filing of briefs was prescribed by the Hearing Examiner.

On July 23, 1976, the PUCO overruled Cincinnati's objections to the motion to sever Cases No. 581 and 641 from Case No. 205, granted the motion to sever, and issued an opinion in which each of the issues common to the three cases were decided in a manner adverse to the positions and interests of Cincinnati (App. D, pp. 43a-45a).[7] The PUCO ruled in favor of uniform rates and uniform assessment of the erosion adjustment (App. D, pp. 53a-54a). The PUCO's decision on the merits of the common issues was made in Cases No. 581 and 641 without consideration of Cincinnati's cross-examination of CG&E and PUCO Staff witnesses, Cincinnati's evidence adduced through an expert witness, and briefs filed by Cincinnati, since these items were not before the PUCO at the time of its decision in Cases No. 581 and 641.

Subsequently, on September 8, 1976, the PUCO issued its decision in Case No. 205 (App. E). In that decision, as was foreordained by the decision in Cases No. 581 and 641, each of the issues common to the three cases was decided exactly as they had been decided in Cases No. 581 and 641.

[7]With reference to the common issues of uniform rates and the uniform spreading of the erosion adjustment, the PUCO stated (App. D, p. 43a) that "(n)o party to these two proceedings has objected to these recommendations." This statement was not correct. It was based on the PUCO's incorrect assertion that Cincinnati was "a party only to" Case No. 205 (App. D, p. 43a). Cincinnati was a party to Cases No. 581 and 641 (footnote 5, *supra*). The PUCO's motion in the Supreme Court of Ohio to dismiss Cincinnati's appeal from the decision in Cases No. 581 and 641 on the ground that Cincinnati was not a party to those cases was overruled by the Supreme Court of Ohio (App. K).

Cincinnati filed timely applications for rehearing of the decisions in Cases No. 581 and 641 and Case No. 205 which were denied (App. F; App. G).[8] Following denial of the applications for rehearing, timely appeals were filed in the Supreme Court of Ohio from the PUCO's decisions and denials of rehearing. The appeals from the two decisions were heard together by the Supreme Court of Ohio.

By its opinion of July 19, 1978, the court below rejected Cincinnati's claim that its right to a fair hearing guaranteed by the Fourteenth Amendment to the United States Constitution had been violated by the PUCO's severance of Cases No. 581 and 641 and its decision of the issues common to the three cases in Cases No. 581 and 641 without regard to all of the evidence adduced by Cincinnati through cross-examination and its own expert witness. The court below affirmed the orders of the PUCO (55 Ohio St. 2d 168, 378 N.E. 2d 729). Cincinnati's timely motion for rehearing was denied on September 7, 1978 (App. C).

## REASONS FOR GRANTING THE WRIT

CG&E's three rate increase applications were filed pursuant to Ohio R.C. 4909.18 (App. H). In each case the PUCO ordered that the procedural steps set forth in Ohio R.C. 4909.19 (App. H) be followed. Ohio R.C. 4909.19 requires, in the event that objections are filed by any party to the PUCO Staff's Report of Investigation of a

[8] Rehearing of the decision in Cases No. 581 and 641 was denied on the erroneous ground that Cincinnati was not a party to Cases No. 581 and 641; and that, therefore, none of its rights were affected by the decision (App. F, p. 85a).



utility's application for increased rates, that the application be set down for hearing before the PUCO or one of its Hearing Examiners who is "to take all the testimony with respect to the application and objections which may be offered by any interested party" and shall file with the PUCO "a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel." Objections were filed by CG&E and Cincinnati to the Staff's Report of Investigation in the three cases.[9] The PUCO ordered a consolidated hearing to be held in the three cases because of the existence of common issues of fact and law.

1. The hearing required by the statute and ordered by the PUCO, obviously, must be a fair hearing, i.e., one that complies with the requirements of due process of law; not one that is an "empty thing." *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945); cf. *Goss v. Lopez*, 419 U.S. 565, 576 (1975); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 263-264 (1970).

Although agreeing that a party's due process rights may be violated by severance if the effect of holding a hearing for one party only is to make an "empty thing" of the hearing, the court below erred in holding that the severance of Cases No. 581 and 641 from Case No. 205 and the decision of the common issues in Cases No. 581 and 641 without consideration of the total evidentiary record on the common issues did not preclude a different decision of the common issues in Case No. 205 and,

[9] The Staff filed two reports; one in Case No. 581 and a joint report in Cases No. 205 and 641.

therefore, did not make an "empty thing" of Cincinnati's hearing as was the case in *Ashbacker, supra.* (App. A, p. 4a).

2. The error of the court below is quickly revealed by consideration of just two of the common issues.

(a) *Uniform Rates.* Uniform rates means that identical rates are established for each service area in each of the three cases regardless of the difference in the cost of serving each of the three areas and regardless of the different revenue deficiencies in each of the three service areas. Under uniform rates the total company revenue deficiency (the sum of the revenue deficiencies in the three cases) is recovered equally from each service area. Consequently, when the PUCO decided the uniform rate issue in Cases No. 581 and 641 in favor of uniform rates, the issue was effectively decided for Case No. 205 and Cincinnati's hearing became an "empty thing."[10] The door was slammed shut on a decision in favor of non-uniform rates in Case No. 205 regardless of the evidentiary record. A decision in Case No. 205 in favor of non-uniform rates would prevent CG&E from earning the rate of return the PUCO had held CG&E was entitled to earn, would preclude recovery of the total company revenue deficiency, would constitute an admission that Cases No. 581 and 641 were not ripe for decision as the PUCO had

[10]The agreement in Cases No. 581 and 641, approved by the PUCO in its decision, provided that the parties stipulated and recommended "uniform rates as prayed for in the applications" and the agreement in Case No. 205, approved by the PUCO, provided that the parties stipulated and recommended "uniform rates as prayed for in the Application, *such rates to be uniform with those established in Cases No. 74-581-GA-AIR and 75-641-GA-AIR*" (emphasis supplied).



claimed (App. D, p. 44a), and would constitute an admission that the decision in those cases had been premature and wrong. The PUCO's contention that it could decide the issue of uniform rates differently in Case No. 205 under these inhibiting circumstances assaults credulity (App. D, p. 44a). Indeed, CG&E candidly stated in a pleading filed in Case No. 205, following the issuance of the decision in Cases No. 581 and 641, that the decision on uniform rates in Cases No. 581 and 641 eliminated the uniform rate issue from Case No. 205.[11]

(b) *The Erosion Adjustment.* The issue common to each of the three cases was posed by CG&E's motions to recover the loss of earnings due to the decrease in sales revenues in Case No. 581 by uniform (equal) assessment of the loss of earnings against each of the three cases. The issue was whether the loss should be assessed solely against Case No. 581 as originally proposed by CG&E, in which event the customers in Case No. 581 would pay an additional 16 cents per Mcf and rates could not be uniform in each of the three cases, or whether the loss in earnings should be uniformly assessed against each of the three cases in which event the customers in each case

[11]The PUCO Staff filed a Joint Report of Investigation on the rate applications in Cases No. 205 and 641. In that report the Staff recognized that a decision in favor of uniform rates in any one of the three cases would preclude a different decision on the issue in the other cases. The PUCO Staff reported that it had treated the applications "on a consolidated basis since the Applicant has proposed to establish uniform rates among all of these areas. . . . The rates proposed by Applicant in these proceedings are the same. Secondly, such rates and other proposals and amendments are the same as those proposed in Applicant's Case No. 75-581-GA-AIR and are consistent with Applicant's intent to establish uniform rates and tariffs throughout its service areas."

would pay an additional 9 cents per Mcf and rates could be uniform in each of the three cases. The agreements tendered by PUCO Staff and CG&E to the PUCO, and approved by it, recommended grant of the motion.

The PUCO could not in Case No. 205 decide either that the customers in Case No. 205 should bear no part of the burden of the decrease in sales revenues attributable solely to Case No. 581 because they realized none of the benefits of the sales or that the burden should not be borne uniformly by the customers. The PUCO could not make either of these decisions because the motions granted by the PUCO in Cases No. 581 and 641 were motions for uniform assessment of the decrease in sales revenues against each of the three cases. This decision foreclosed a different decision in Case No. 205. Also, it had by that decision decided that customers in Cases No. 641 and 205 did realize benefits from the sales in Case No. 581 and should, therefore, bear a uniform share of the burden. On no other basis could the uniform assessment of the erosion adjustment be justified.

A decision exempting Case No. 205 from assuming any part of the burden on the ground that Case No. 205 shared no benefits of the sales in Case No. 581 or that the burden should not be uniformly assessed would have deprived CG&E of recovery of the total loss in earnings, which would be at odds with the decision in Cases No. 581 and 641, would have precluded its earning the allowed rate of return,[12] and would have undermined the

[12] PUCO counsel and CG&E counsel in briefs filed with the Supreme Court of Ohio, conceded that if the PUCO denied recovery of 9 cents per Mcf in Case No. 205, CG&E would be denied the opportunity to earn the allowed rate of return. And the PUCO

[footnote continued]



decision in favor of uniform rates because rates could then not be uniform in each of the three cases. These consequences of an about-face removed retreat from the decision in Cases No. 581 and 641 from reality.

3. Thus, these common issues, as were other common issues in the three cases (e.g., charitable contributions),[13] were as mutually exclusive in economic terms as were the applications for a license to operate a radio station in physical terms in *Ashbacker, supra.* The common issues could not be decided one way in Cases No. 581 and 641 and another way in Case No. 205. Cf. *Northwest Airlines v. CAB,* 194 F.2d 339, 343-344 (D.C. Cir. 1952), where competing applications for nonstop air routes were held to be mutually exclusive "for the economic reason that

itself in its decision in Case No. 205, referring to the erosion adjustment issue stated (App. E, p. 77a):

> "In effect, without this adjustment, Applicant would earn on an *overall basis,* somewhat less than the rates of return heretofore approved *in this case and the companion cases* assuming that the decreased 1975 sales volumes were experienced in the test year. (R. Vol. IV, 5-6; emphasis supplied)

This statement, expressing concern with CG&E's ability to earn the overall revenues derived from all three cases utterly belies the PUCO's statement that a decision in Cases No. 581 and 641 "cannot possibly prejudice the City if the record in Case No. 75-205-GA-AIR supports a different conclusion" (App. D, p. 44a).

[13] Having decided that CG&E's charitable contributions are a proper charge against the rate payers, the same issues were not going to be decided in a different way in Case No. 205 regardless of the evidence adduced by Cincinnati. The PUCO could hardly rule in Cases No. 581 and 641 that CG&E's charitable contributions are a proper charge against the rate payers and in the next breath in Case No. 205 rule that the same charitable contributions are not a proper charge against the rate payers.

the traffic would not support more than two nonstop operations."

4. The court below misconstrued the essential principle of *Ashbacker, supra.* It does not require the "automatic denial" of competing positions as a prerequisite to denial of due process of law, as the court below believed (App. A, p. 5a. *Ashbacker* "decided that there may be practical reasons for not determining part of an indivisible controversy in advance, even though the first decision will not be conclusive"; that where the issues "are intricately intermeshed" the "very purpose of joining them would be in part defeated if both were not decided together." *W. R. Grace & Co. v. CAB,* 154 F.2d 271, 282, 283 (2d Cir. 1946), *cert dismissed for mootness,* 332 U.S. 827 (1947).

*Ashbacker* "sharply illuminates [the court's] function to serve as a guardian of the basic fairness which should characterize the procedures by which the Commission makes its substantive determinations." *Community Broadcasting Corp. v. FCC,* 363 F.2d 717, 721 (D.C. Cir. 1966). The basic principle underlying the *Ashbacker* decision was the concept of the fair hearing guaranteed by the Constitution for the "denial of a hearing granted by statute is a denial of due process of law." *Storer Broadcasting Co. v. FCC,* 220 F.2d 204, 207 (D.C. Cir. 1955), rev'd. on other grounds, *United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956).

5. This case presents a constitutional question of importance to consumers of utility services in the State of Ohio and in each state of these United States. The consumers are dependent upon the regulatory commissions for just and reasonable rates and when the consumers or their representatives participate in the regulatory proceedings in defense of their rights, they are dependent



also on fair play at the hands of the regulatory commissions. As this Court stated in an Ohio rate case that originated before the PUCO, discussing the broad powers given regulatory commissions:

> "All the more persistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored. (citations omitted)." *Ohio Bell Tel Co. v. Public Utilities Comm'n.,* 301 U.S. 292, 304-305 (1937).

The decision of the court below is clearly contrary to and in conflict with *Ashbacker* and other decisions of this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court below reversed, with instructions to vacate the decisions of the PUCO and to order refunds to Cincinnati and all other customers of the monies collected under the increased rates and charges imposed by CG&E under the unlawful decisions of the PUCO.

Respectfully submitted,

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December 6, 1978

# APPENDIX

## APPENDIX A

[55 Ohio St. 2d]

JANUARY TERM, 1978.

**Statement of the Case.**

City of Cincinnati, Appellant, v. Public Utilities Commission of Ohio et al., Appellees. (Two cases.)

[Cite as Cincinnati v. Pub. Util. Comm. (1978), 55 Ohio St. 2d 168.]

*Public Utilities Commission—Electric companies—Rate increase—Calculation of operating expenses—Inclusion of charitable contributions.*

(Nos. 78-1230 and 76-1326—Decided July 19, 1978.)

Appeals from the Public Utilities Commission.

The instant causes arise out of an application by the Cincinnati Gas & Electric Company (hereinafter company) for a rate increase for gas service to the appellant, the city of Cincinnati (hereinafter city), filed on March 25, 1975, with appellee, the Public Utilities Commission of Ohio (hereinafter commission). At the time the rate increase application for the city was filed, the company also had a rate increase application before the commission for service to certain unincorporated areas. The company applied for a rate increase in a number of municipalities other than Cincinnati a few months later. (The city, the municipalities and the unincorporated areas covered by the company's three rate increase applications constituted the total areas serviced by the company.)

On April 8, 1975, the city filed a petition for leave to intervene which was granted in June 1976. On June 4, 1976, the company filed a motion proposing that the in-

crease in rates, including a charge for earnings erosion, be spread uniformly among all its customers in each of the three pending gas rate cases. The commission consolidated the three rate increase cases on the grounds that they shared common questions of law and fact and approved for publication a notice advising the public of the proposed rates on July 9, 1976.

On July 14, 1976, the company, the commission's staff and intervenor Armco Steel Corporation submitted a joint recommendation stipulating certain prefiled testimony in evidence, waiving cross-examination and recommending a rate increase awarding the company 92 percent of its requested rate increase, uniform rates in each of the three areas and an additional nine cents per thousand cubic feet in each case to compensate the company for the erosion of earnings. (That nine-cent rate was lower than that originally proposed for the unincorporated areas.) The city declined to join in a similar stipulation with regard to its rate increases. The parties in the other two cases moved that their actions be severed from the city's. By its order of July 23, 1976, the commission determined over the objection of the city that the cases involving the municipalities and unincorporated areas were ripe for decision and should be severed. The commission also authorized rate increases for those two areas in the recommended amounts.

In September 1976, the commission ruled on the rate increase case affecting the city. The commission ordered uniform rates, a nine cent per thousand cubic foot erosion adjustment rate and a 7.74 percent rate of return for the company.

The causes are now before this court on appeals by the city from the commission's July severance order (case No. 76-1230) and its September rate award (case No. 76-1326). The appeals are before this court as a matter of right.



*Mr. Thomas A. Luebbers,* city solicitor, *Mr. W. Peter Heile, Messrs. Goldberg, Fieldman & Hjelmfelt* and *Mr. Reuben Goldberg,* for appellant.

*Mr. William J. Brown,* attorney general, *Mr. Charles S. Rawlings, Ms. Cheryl K. Hachman, Mr. Marvin I. Resnik, Mr. Kevin F. Duffy and Mr. Mark C. Sholander,* for appellee.

*Messrs. Squire, Sanders & Dempsey, Mr. Alan P. Buchmann, Mr. William C. Donohue, Mr. William J. Moran* and *Mr. James J. Mayer,* for intervening appellee Cincinnati Gas & Electric Co.

*Per Curiam.* Appellant raises numerous propositions of law in its appeals. Two of those are constitutional challenges. The remaining propositions raised by appellant primarily challenge the reasonableness and lawfulness of the rates established by the commission and the calculation of expenses used by the commisssion when it determined those rates.

I.

In its first proposition of law the city contends that the severance of its case from the rate cases concerning the rest of the area serviced by the gas company denied the city due process of law and a fair hearing in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution, because the decisions as to uniform rates and earnings erosion adjustments made in the municipality and unincorporated area cases precluded any different decisions in the city's rate increase case.[1]

[1]The city also contends that it was denied due process and a fair hearing because the commission's staff and the other areas ser- [footnote continued]

As a general rule, an administrative agency's decision to consolidate or not consolidate two or more proceedings is a matter of administrative discretion and does not affect the party's rights to due process. See 1 Ohio Jurisprudence 2d 366, Actions, Section 82; Davis, Administrative Law, Section 8.10; *Transcon Builders, Inc. v. Lorain* (1976), 49 Ohio App.2d 145, 359 N.E.2d 715. However, a party's due process rights may be violated by the decision to sever two cases if the effect of holding a hearing for one party only is to make the second party's hearing an empty thing. *Ashbacker Radio Corp. v. F.C.C.* (1945), 326 U.S. 327, 330.

We do not find, however, that the *Ashbacker* doctrine applied to the instant cause. Under the facts of the *Ashbacker* case, the grant of one station's radio broadcasting application meant the *automatic denial* of the second station's license request. The two applications were mutually exclusive. In the instant cause, the commission's grant of one rate outside the city did not preclude the possiblity of a different rate inside the city.

The commission's *order* offsetting the company's loss of sales to interruptible industrial customers by adopting a nine cent per thousand cubic foot earnings erosion adjustment in the municipalities and unincorporated areas only authorized the company to recover an *allocated share* of that total loss of revenue. Therefore, while it might have been economically questionable for the commission to determine that something considerably less than a nine cent rate was reasonable for the city, the city

viced by the company effectively settled their rate disputes before it was afforded the opportunity to participate in those negotiations. We find this argument to be without merit. It is undisputed that the city was informed of the negotiations. Appellant's second proposition of law is, therefore, overruled.



was not *automatically denied* a lower earnings erosion rate by the order in the earlier case.[2] Similarly, the adoption of uniform rates outside the city did not mandate the adoption of such a rate inside the city because there is no requirement that rates of return be uniform throughout a utility's entire service area if those rates of return are reasonable. *General Telephone Co. v. Pub. Util. Com.* (1976), 46 Ohio St.2d 281, 348 N.E.2d 339. We therefore find that the severance of the city's case from the cases concerning the company's noncity customers did not deny the city due process of law and a fair hearing in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution. The city's first proposition of law is, therefore, overruled.

II.

In addition to its constitutional arguments, the city also takes exception to the rate increases ordered by, and the methods for determining those increases applied by, the commission in its finding and September order on the company's application to increase rates within the city. The methods for determining those rates which the city questions have to do with the commission's inclusion of certain expenses in its rate-making formula. The challenged expenses include the company's charitable contributions and (as they were computed by the commission) the company's federal income tax and test-year operating expenses. The increases challenged by the city include (1)

[2]Given the evidence that the city benefited from the increased gas resources made available by the utility's sales losses, it was highly unlikely that the commission would have found a rate *significantly* lower than nine cents per thousand cubic feet to be reasonable and lawful.

the nine cent per thousand cubic foot earnings erosion charge; (2) the commission's prescription of uniform rates; and (3) the allowance of a 7.74 percent overall rate of return.

The first issue we address is the city's contention that the commission's inclusion of charitable contributions in its calculation of operating expenses was unreasonable and unlawful.

The value of charitable contributions by public utilities has been recognized in other jurisdictions. *Re New York Telephone* (N.Y. Pub. Serv. Comm., July 1, 1970), 84 PUR 3d 321, at page 349. The federal Power Commission has allowed such contributions to be included in the cost of service, stating, in *Re United Gas Pipe Line Co.* (1964), 31 FPC 1180, 1189, 54 PUR 3d 285, 295:

"* * * We believe that contributions of a reasonable amount to recognized and appropriate charitable institutions constitute a proper operating expense. Corporations have an obligation to the communities in which they are located and they are expected to recognize this obligation. It is our opinion that these contributions have an important relationship to the necessary costs of doing business."

Moreover, given the vigorous fund-raising efforts of charities, contributions made by utilities are frequently less than voluntary (1 Priest, Principles of Public Utility Regulations [1969], 87). In addition, most charities depend upon corporate contributions, including contributions by utilities, for their existence. (*Re New York Telephone, supra,* at page 350.) The realities of charity fund raising and the benefit to society provided by charitable organizations would appear to justify including the cost of a utility's charitable contributions in its operating expenses. Moreover, the cost of a utility's charitable contributions borne by an individual consumer should be minimal if the utility's total contributions are reasonable, and



the contributions themselves might directly benefit the consumer if the organizations supported by the utility provide services in the communities in which the consumers reside. We therefore find that the commission operates reasonably and lawfully when it includes a utility's reasonable charitable contributions[3] which benefit the communities in which they are made in its calculation of the utility's operating expenses. The city's fifth proposition of law is therefore rejected.

The remaining operating expense calculations challenged by the city as unreasonable and unlawful are those resulting in the commission's figures for federal income tax and test-year expenses.

This court's standard of review for a determination by the Public Utilities Commission is set forth in R.C. 4903.-13.

R.C. 4903.13 provides:

"A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable."

Under the "unlawful" or "unreasonable" standard of R.C. 4903-13, this court will not reverse or modify a determination unless that determination is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *Delphos v. Pub. Util.*

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[3]This position was given implicit support in our recent decision in *Franklin Co. Welfare Rights Org. v. Pub. Util. Comm.* (1978), 55 Ohio St. 2d 1, which upheld the commission's allocation of charitable contributions. It has also been expounded in a number of commission cases including *Re Ohio Bell Telephone Co.* (1976),

[footnote continued]

*Comm.* (1940), 137 Ohio St. 422, 424, 30 N.E.2d 688; *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 330 N.E.2d 1, paragraph eight of syllabus; and *General Motors Corp. v. Pub. Util. Comm.* (1976), 47 Ohio St.2d 58, 351 N.E.2d 183, paragraph two of the syllabus.

The commission's federal income tax and test-year expense calculations are not manifestly against the weight of the evidence.

In its fourth proposition of law, the city challenges as unreasonable and unlawful "the establishment of rates based on an allowance for federal income taxes in excess of the company's actual tax liability." To begin with, the record reveals that any discrepancies which may exist between the company's effective tax rate and the rate applied by the staff were not due to consolidation. Therefore, the city's reliance on *Federal Power Commission v. United Gas Pipe Line Co.* (1967), 386 U.S. 237, 87 S.Ct. 1003, 18 L.Ed.2d 18, is misplaced. Moreover, the record does not clearly indicate that the staff applied a 48 percent corporate tax rate when it calculated the company's federal income tax liability for rate-making purposes. (The witness who mentioned a 48 percent tax rate merely stated that the 48 percent tax rate used to calculate the federal income tax would be on revenues accrued after the company received rate relief. In addition, since the company in the instant cause is a flow-through company

74-761-TP-AIR, 15 PUR 4th 344. The contributions which the commission has approved in the *Ohio Bell* opinion and in the past have not exceeded 0.10 percent of gross test-year operating revenues. The charitable contributions at issue in the instant cause amount to about a 0.1 percent of the gross test-year operating revenues. We do not find this amount of deviation from 0.10 percent sufficient to render the commission's inclusion of charitable contributions as operating expenses to the instant cause unreasonable or unlawful.



for accounting purposes and the staff accountants started with the tax expense recorded in the utility's books, it is likely that the difference in the effective tax rate and the 48 percent rate was reflected in the staff's figures.) In light of the above evidence, we cannot say that the commission's calculation of federal income taxes is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *General Motors Corp., supra.* The city's fourth proposition of law is, therefore, overruled.

The last calculation challenged by the city is the test-year expense figure used by the commission. Since the record reveals that the test-year expenses recommended by the staff did not include an adjustment for post-year wage increases,[4] we find this argument to be without merit, and we find it unnecessary to address the issue of whether such wage increases may be considered in test-year expenses. The city's sixth proposition of law is thereby overruled.

III.

The city also challenges three rate increases ordered by the commission. The first rate increase which the city takes exception to is the commission's application of a nine cent per thousand cubic foot earnings erosion charge. While it is true that the commission applied a uniform earnings erosion charge to the city and noncity areas serviced by the company even though the greatest

[4]In the Staff Report of Investigation in the case involving customers in Cincinnati, the staff incorporated by reference all accounting recommendations contained in the Staff Report in the case involving customers in unincorporated areas. The latter Staff Report recommended that no adjustments should be made for the test-year cost increases.

proportion of the eroded earnings occurred outside the city, the application of that rate in the instant cause is not unreasonable or unlawful. The commission found that establishing a uniform earnings erosion rate was justified because the gas made available by the interrupted service causing the earnings erosion "is of benefit to *all* its firm customers, without regard to the chances of municipal boundaries." In light of the testimony at the rate increase hearing that the gas not delivered to interruptible customers becomes available to the entire system, including the city of Cincinnati, we cannot say that the commission's determination was manifestly against the weight of the evidence or that its establishment of a nine cent earnings erosion charge was unreasonable or unlawful. The city's first challenge to the rates imposed upon it is therefore overruled.

The second rate challenged by the city is the uniform rate imposed on it by the commission. The city argues that the commission's application of a uniform rate should not be sustained because the record reveals no substantial evidence supporting the establishment of uniform rates. At the hearing, the company presented testimony that traditional wisdom concerning the cost of providing gas to city and noncity residents no longer applies and that, instead, the cost of noncity service has so decreased and the cost of city service has so increased that a uniform rate is justifiable. In support of that position, the utility's witness cited the increasing density of noncity populations which lowers noncity service cost, the age of the city's plant, the location of its pipelines and the numbers of the city's uncollectable accounts which raise its service costs and the ever-increasing percentage of cost which is attributable to expenses like gas purchases which remain the same regardless of whether



the customer is a city or a noncity resident. In light of that testimony, we cannot agree with appellant that the commission's prescription of a uniform rate is manifestly against the weight of the evidence. The city's second challenge to the commission's rate determinations is without merit.

The city's third challenge to the rates imposed on it by the commission is that "the overall rate of return of 7.74 percent was also unlawful." We disagree. Of the two expert witnesses testifying before the commission, one suggested as fair and reasonable a rate of return of 8.8 percent to 10.2 percent. The commission's staff witness suggested a wider range, including the 7.74 percent finally adopted. In the absence of evidence refuting this testimony, we do not find that overall rate of return to be unlawful or unreasonable. The city contends further that despite the expert testimony supporting a 7.74 percent rate of return as reasonable, the rate of return adopted by the commission was *per se* unreasonable because the commission relied on an excessive estimate of the company's rate of return on common equity to arrive at the 7.74 percent figure. Even if we assume, *arguendo*, that the 12 to 13 percent rate of return on common equity figure adopted by the commission is excessive *per se*, we cannot find that the 7.74 percent rate of return was excessive in the absence of evidence showing a direct correlation between the rate of common equity and the rate of return. We therefore find that the commission's adoption of a 7.74 percent rate of return was reasonable and lawful. The city's final challenge to the rates imposed on it by the commission is, therefore, without merit.

The orders of the Public Utilities Commision being neither unreasonable nor unlawful are accordingly affirmed.

*Orders affirmed.*

C. WILLIAM O'NEILL, C. J., and HERBERT, WILLIAM B. BROWN, PAUL W. BROWN and SWEENEY, JJ., concur.

CELEBREZZE, J., concurs in the judgment.

LOCHER, J., dissents.

LOCHER, Justice, dissenting.

I must respectfully dissent.

The majority opinion inexorably leads to the ratepayers shouldering the expense of a public utility's (a monopoly guaranteed by the state) charitable contributions.

Citing three cases that permit expense of charitable contributions of a utility to be charged to the ratepayers and referring to a comment in Priest, Principles of Utility Regulation (1969), at page 87, that contributions by utilities are frequently less than voluntary, the opinion rather nonchalantly accepts a passing of these costs on to the ratepayers as if no other result were conceivable.

In my prior dissent in *Franklin Co. Welfare Rights Org. v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 1, 377 N.E.2d 990, I quoted at length from an opinion of the Supreme Court of Alabama,[5] wherein that august body, with good justification, declined the opportunity to burden the utility ratepayers with the charitable contributions of the public utility. The issue of whether the ratepayer should be required in his or her utility bill to pay for the utility's donations was not directly before this court in *Franklin Co. Welfare Rights Org., supra.* The issue now properly before this court, and thus I have had the opportunity to

[5] *Alabama Power Co. v. Alabama Public Service Comm.* (Ala. 1977), CCH Pub. Util. Law Rptr., New Matters.



closely examine its resolution in other jurisdictions. An examination reveals that, since 1972, this issue has been addressed in approximately 30 states, not including Ohio.[6] Of those states, 23 have taken the path rejected by the majority and have, in the normal course, refused to allow a public utility to charge its ratepayers for its donations. Only a mere six states, including New York, as noted by the majority, have allowed recoupment of these donations from the utility's consumers.[7] The Illinois Supreme Court, in *Illinois Bell Telephone Co. v. Illinois Commerce Comm.* (1973), 55 Ill.2d 461, 303 N.E.2d 364, 3 PUR 4th 36, at page 480 of its opinion, noted the commission's reference to *Virtjak v. Illinois Bell Telephone Co.* (Ill.1959), 32 PUR 3d 385, but then held that the utility's charitable contributions were not operating expenses cognizable for the purposes of rate-making. Apparently, none of our neighboring states in the normal course permits a public utility to charge its charitable contributions to its consumers. *Re Indianapolis Power & Light Co.* (Ind.1975), 9 PUR 4th 86; *Re Union Light, Heat & Power Co.* (Ky.1953), 97 PUR N.S. 33; *Re Potomac Edison Co. of W. Va.* (W.Va.1974), 6 PUR 4th 183; *Bainbridge Motor Co. v. General Telephone Co. of Pa.* (Pa.1975), 12 PUR 4th 416; *Re Detroit Edison Co.* (Mich.1970), 83 PUR 3rd 463.[8]

I wish at this point to emphasize that I am *not* urging that utilities be prohibited from making contributions but only that they be precluded from charging them against their ratepayers. Furthermore, I have no doubt as

[6] 3 PUR Digest, 2d Series, 1977 Supp., Expenses, Section 46.

[7] Conflict apparently exists between the Supreme Court of Washington and the commission with regard to this issue.

[8] Contra: *Re Michigan Bell Telephone Co.* (Mich. 1975), Case No. U-4575.

to the importance of these contributions to the donees, or that these donations are devoted to beneficial uses. I do believe, however, that it is grossly improper to permit a utility to charge its customers for the utility's charitable contributions.

The Supreme Court of California, in *Pacific Tel. & Tel. Co. v. Public Util. Comm.* (1965), 62 Cal.2d 634, 44 Cal. Rptr. 1, 401 P.2d 353, held that a utility's attempt to charge all of its own contributions as an operating expense to be borne by the ratepayers was plainly unwarranted. Relying upon the observations of the Public Utilities Commission of California in its decision, the California Supreme Court quoted with approval the following portion thereof, at page 668, 44 Cal.Rptr. at page 22, 401 P.2d at page 374.

"'Dues, donations and contributions if included as an expense for rate making purposes, become an involuntary levy on ratepayers, who, because of the monopolistic nature of utility service, are unable to obtain service from another source and thereby avoid such a levy. Ratepayers should be encouraged to contribute directly to worthy causes and not involuntarily through an allowance in utility rates. [Pacific] should not be permitted to be generous with ratepayers' money but may use its own funds in any lawful manner.'"

The Illinois Supreme Court, in *Illinois Bell Telephone Company, supra,* 55 Ill.2d at page 481, 303 N.E.2d at page 375, stated:

"* * * [W]e conclude that the allowance of such contributions as operating expenses for purposes of rate making constitutes an involuntary assessment on the utility's patrons, and we question the propriety of Bell's being permitted to thus dispense largesse at their expense."



The Colorado Public Utilities Commission, in *Re Mountain States Telephone & Telegraph Co.* (1972), 96 PUR 3d 321, 326, expressed its opinion on this issue as follows:

"Donations and charitable contirbutions are made purely at management discretion, accrue to the benefit of the corporation and its owners and should be borne by the stockholders rather than ratepayers * *."

The North Carolina Utilities Commission echoed a similar sentiment in *Re Virginia Electric & Power Company* (1975), 11 PUR 4th 115, wherein it stated, at page 124:

"* * * The commission is of the opinion that charitable and educational donations is [*sic*] an expense which should be borne by the company's stockholders, not its ratepayers. The ratepayers have no voice in determining to which charities and institutions, if any, the donations are to be made. The ratepayers should not be made involuntary donors to charitable and educational institutions through the payment of electric rates."

In *Re Chesapeake & Potomac Telephone Company of W. Va.* (1977), 22 PUR 4th 197, the utility argued that the charitable contributions were not to enhance the company's image but were made as a result of its obligation to perpetuate the social well-being of the community it services. It, thus, contended that the ratepayer will ultimately benefit from such contributions and therefore they should be included in the cost of service. The West Virginia Public Service Commission responded, at page 205, in the following manner:

"While it is true that such contributions to local service areas do benefit the communities served, they also tend to upgrade the company's public image and therefore work more to the benefit of the utility and its stockholders than to the benefit of the subscribers. Such an

undertaking should be financed by the ownership rather than the utility customers and to allow these expenditures to be treated as an item of operating expense would be to require an involuntary contribution by ratepayers to charities which they may or may not otherwise support."

Apart from other jurisdictions, the Ohio Public Utilities Commission (commission), in *East Ohio Gas Co. v. Cleveland* (1934), 4 PUR N.S. 433, disallowed the utility's claim as an expense of its contributions to the Cleveland community fund, stating that it is the right of the stockholders to make such contributions if they desire, but that it would be unfair to permit them to be reimbursed for such expenditures from the customers of the company, who may have already been contributing to the same cause. Adhering to this same principle the commission again rejected the utility's contention that donations were operating expenses in *Re Springfield Gas Co.* (1937), 19 PUR N.S. 1, stating at page 17:

"* * * It has been universally held that donations to charitable and religious institutions and to civic organizations and clubs * * * while evidence of the company's interest in public welfare and the upbuilding of the community and its participation in public activities, are to come out of surplus and not chargeable to the ratepayers through the medium of operating expenses. It is generally recognized that ratepayers themselves are likewise making similar contributions."

The commisson has not been steadfast in its deviation from prior decisions. In *Re Cleveland Electric Illuminating Co.* (1973), 3 PUR 4th 259, the commission recognized that it had not established a clear precedent as to the allowance or disallowance of charitable contributions as an appropriate item of expense for rate-making purposes. Cognizant of its earliest decisions wherein such donations were disallowed, followed by a period wherein such contributions were an allowable expense, the commission in that cause found that of the $636,149 of charitable contributions during the test year only $300,000 was to be allowed for rate-making purposes. The commission then concluded its discussion on this subject, at page 274, with the following remarks:



"Moreover, we hereby signal the industry that we are moving towards a policy decision that charitable contributions should *not* be included at all as an appropriate item for rate base purposes."

It is evident that the commission has in recent years, for reasons not clearly expressed, never implemented the rule it announced in 1973. See *Re Ohio Bell Telephone Co.* (1976), 15 PUR 4th 344.

This issue is a matter of first impression before this court. Given the apt reasoning expressed in other states for disallowing a utility's attempt to charge its own contributions to its customers, the early decisions of Ohio which similarly refused to consider these donations for rate-making purposes and unjustified oscillation of the commission since its early decisions on this issue which has been repeatedly and consistently raised by concerned consumers, I am constrained to conclude that the charitable contributions of a utility, a monopoly with a guaranteed fair rate of return, should not be involuntarily borne by the consumer, who cannot obtain this service from another source, but should instead be the responsibility of the utility's shareholders, who not only control the company but share in its guaranteed profits. Moreover, in light of the General Assembly's recent concern with utility rates, as is readily discernible from its discarding of the old RCNLD standard (see my dissent in *Akron*

*v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155, _____ N.E.2d _____) and its recent establishment of the Public Utilities Commission Consumers' Counsel, R. C. Chapter 4911, the majority's opinion clearly is contra to the implied intentions of the General Assembly.

I am further in disagreement with the majority's summarily affirming the commission's action of severing the cases involving the municipalities and unincorporated areas. Despite protestations that its decision with respect to these two causes in approving uniform rates and the nine cent earnings erosion adjustment did not automatically deny the city of Cincinnati a different rate or a lower erosion adjustment, the plain facts are that the commission eventually approved both the nine cent earnings erosion adjustment and the uniform rate in the cause involving Cincinnati. Having dwelt on the issue of charitable contributions in such an extended manner, I will not attempt an in-depth analysis of this facet of the instant cause. I believe it is sufficient to state that these actions of the commission have the appearance of impropriety and, when combined with the highly technical parlance of engineering and accounting inherent within a rate case, this court should not so lightly grant its *imprimatur.*

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## APPENDIX B

[378 N.E.2d 729]

55 Ohio St.2d 168

CITY OF CINCINNATI, Appellant,

v.

PUBLIC UTILITIES COMMISSION of Ohio et al., Appellees (two cases.)

Nos. 76-1230, 76-1326.

Supreme Court of Ohio.

July 19, 1978.

City appealed order of Public Utilities Commission severing its rate case from noncity gas customers and order granting gas utiility a rate increase. The Supreme Court held that: (1) severance did not deny city due process and a fair hearing; (2) inclusion of charitable contributions in calcuations of operating expense was not unlawful; (3) applying uniform earnings erosion charge to city and noncity service areas was not unreasonable, and (4) even if 12 to 13 percent rate of return on common equity was excessive it could not be said that the 7.74 percent rate of return was excessive absent showing of direct correlation between the rate of common equity and the rate of return.

Affirmed.

Celebrezze, J., concurred in judgment.

Locher, J., filed dissenting opinion.

* * *

The instant causes arise out of an application by the Cincinnati Gas & Electric Company (hereinafter company) for a rate increase for gas service to the appellant, the city of Cincinnati (hereinafter city), filed on March 25, 1975, with appellee, the Public Utilities Commission of Ohio (hereinafter commission). At the time the rate increase application for the city was filed, the company also had a rate increase application before the commission for service to certain unincorporated areas. The company applied for a rate increase in a number of municipalities other than Cincinnati a few months later. (The city, the municipalities and the unincorporated areas covered by the company's three rate increase applications constituted the total areas serviced by the company.)

On April 8, 1975, the city filed a petition for leave to intervene which was granted in June 1976. On June 4, 1976, the company filed a motion proposing that the increase in rates, including a charge for earnings erosion, be spread uniformly among all its customers in each of the three pending gas rate cases. The commission consolidated the three rate increase cases on the grounds that they shared common questions of law and fact and approved for publication a notice advising the public of the proposed rates on July 9, 1976.

On July 14, 1976, the company, the commission's staff and intervenor Armco Steel Corporation submitted a joint recommendation stipulating certain prefiled testimony in evidence, waiving cross-examination and recommending a rate increase awarding the company 92 percent of its requested rate increase, uniform rates in each of the three areas and an additional nine cents per thousand cubic feet in each case to compensate the company for the erosion of earnings. (That nine-cent rate was lower than that originally proposed for the unincorporated areas.) The



city declined to join in a similar stipulation with regard to its rate increases. The parties in the other two cases moved that their actions be severed from the city's. By its order of July 23, 1976, the commission determined over the objection of the city that the cases involving the municipalities and unincorporated areas were ripe for decision and should be severed. The commission also authorized rate increases for those two areas in the recommended amounts.

In September 1976, the commission ruled on the rate increase case affecting the city. The commission ordered uniform rates, a nine cent per thousand cubic foot erosion adjustment rate and a 7.74 percent rate of return for the company.

The causes are now before this court on appeals by the city from the commission's July severance order (case No. 76-1230) and its September rate award (case No. 76-1326). The appeals are before this court as a matter of right.

Thomas A. Luebbers, City Sol., W. Peter Heile, Cincinnati, Goldberg, Fieldman & Hjelmfelt and Reuben Goldberg, Washington, D.C., for appellant.

William J. Brown, Atty. Gen., Charles S. Rawlings, Cheryl K. Hachman, Marvin I. Resnik, Kevin F. Duffy and Mark C. Sholander, Columbus, for appellee.

Squire, Sanders & Dempsey, Mr. Alan P. Buchmann, William C. Donahue, Cleveland, William J. Moran and James J. Mayer, Cincinnati, for intervening appellee Cincinnati Gas & Electric Co.

PER CURIAM.

Appellant raises numerous propositions of law in its appeals. Two of those are constitutional challenges. The remaining propositions raised by appellant primarily challenge the reasonableness and lawfulness of the rates established by the commission and the calculation of expenses used by the commission when it determined those rates.

I.

[1-4] In its first proposition of law the city contends that the severance of its case from the rate cases concerning the rest of the area serviced by the gas company denied the city due process of law and a fair hearing in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution, because the decisions as to uniform rates and earnings erosion adjustments made in the municipality and unincorporated area cases precluded any different decisions in the city's rate increase case.[1]

As a general rule, an administrative agency's decision to consolidate or not consolidate two or more proceedings is a matter of administrative discretion and does not affect the party's rights to due process. See 1 Ohio Jurisprudence 2d 366, Actions, Section 82; Davis, Administrative Law, Section 8.10; *Transcon Builders, Inc. v. Lorain* (1976), 49 Ohio App.2d 145, 359 N.E.2d 715. However,

[1]The city also contends that it was denied due process and a fair hearing because the commission's staff and the other areas serviced by the company effectively settled their rate disputes before it was afforded the opportunity to participate in those negotiations. We find this argument to be without merit. It is undisputed that the city was informed of the negotiations. Appellant's second proposition of law is, therefore, overruled.



a party's due process rights may be violated by the decision to sever two cases if the effect of holding a hearing for one party only is to make the second party's hearing an empty thing. *Ashbacker Radio Corp. v. F.C.C.* (1945), 326 U.S. 327, 330, 66 S.Ct. 148, 90 L.Ed. 108.

We do not find, however, that the *Ashbacker* doctrine applied to the instant cause. Under the facts of the *Ashbacker* case, the grant of one station's radio broadcasting application meant the *automatic denial* of the second station's license request. The two applications were mutually exclusive. In the instant cause, the commission's grant of one rate outside the city did not preclude the possiblity of a different rate inside the city.

The commission's *order* offsetting the company's loss of sales to interruptible industrial customers by adopting a nine cent per thousand cubic foot earnings erosion adjustment in the municipalities and unincorporated areas only authorized the company to recover an *allocated share* of that total loss of revenue. Therefore, while it might have been economically questionable for the commission to determine that something considerably less than a nine cent rate was reasonable for the city, the city was not *automatically denied* a lower earnings erosion rate by the order in the earlier case.[2] Similarly, the adoption of uniform rates outside the city did not mandate the adoption of such a rate inside the city because there is no requirement that rates of return be uniform throughout a utility's entire service area if those rates of return are reasonable. *General Telephone Co. v. Pub. Util.*

[2] Given the evidence that the city benefited from the increased gas resources made available by the utility's sales losses, it was highly unlikely that the commission would have found a rate *significantly* lower than nine cents per thousand cubic feet to be reasonable and lawful.

*Com.* (1976), 46 Ohio St.2d 281, 348 N.E.2d 339. We therefore find that the severance of the city's case from the cases concerning the company's noncity customers did not deny the city due process of law and a fair hearing in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution. The city's first proposition of law is, therefore, overruled.

II.

In addition to its consitutional arguments, the city also takes exception to the rate increases ordered by, and the methods for determining those increases applied by, the commission in its finding and September order on the company's application to increase rates within the city. The methods for determining those rates which the city questions have to do with the commission's inclusion of certain expenses in its rate-making formula. The challenged expenses include the company's charitable contributions and (as they were computed by the commission) the company's federal income tax and test-year operating expenses. The increases challenged by the city include (1) the nine cent per thousand cubic foot earnings erosion charge; (2) the commission's prescription of uniform rates; and (3) the allowance of a 7.74 percent overall rate of return.

[5] The first issue we address is the city's contention that the commission's inclusion of charitable contributions in its calculation of operating expenses was unreasonable and unlawful.

The value of charitable contributions by public utilities has been recognized in other jurisdictions. *Re New York Telephone* (N.Y. Pub. Serv. Comm., July 1, 1970), 84 PUR 3d 321, at page 349. The federal Power Commission



has allowed such contributions to be included in the cost of service, stating, in *Re United Gas Pipe Line Co.* (1964), 31 FPC 1180, 1189, 54 PUR 3d 285, 295:

"* * * We believe that contributions of a reasonable amount to recognized and appropriate charitable institutions constitute a proper operating expense. Corporations have an obligation to the communities in which they are located and they are expected to recognize this obligation. It is our opinion that these contributions have an important relationship to the necessary costs of doing business."

Moreover, given the vigorous fund-raising efforts of charities, contributions made by utilities are frequently less than voluntary (1 Priest, Principles of Public Utility Regulations [1969], 87). In addition, most charities depend upon corporate contributions, including contributions by utilities, for their existence. (*Re New York Telephone, supra,* at page 350.) The realities of charity fund raising and the benefit to society provided by charitable organizations would appear to justify including the cost of a utility's charitable contributions in its operating expenses. Moreover, the cost of a utility's charitable contributions borne by an individual consumer should be minimal if the utility's total contributions are reasonable, and the contributions themselves might directly benefit the consumer if the organizations supported by the utility provide services in the communities in which the consumers reside. We therefore find that the commission operates reasonably and lawfully when it includes a utility's reasonable charitable contributions[3] which benefit

[3]This position was given implicit support in our recent decision in *Franklin Co. Welfare Rights Org. v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 1, 377 N.E.2d 990, which upheld the commission's allocation of charitable contributions. It has also been expounded in a number of commission cases including *Re Ohio Bell Tele-*
[footnote continued]

the communities in which they are made in its calculation of the utility's operating expenses. The city's fifth proposition of law is therefore rejected.

The remaining operating expense calculations challenged by the city as unreasonable and unlawful are those resulting in the commission's figures for federal income tax and test-year expenses.

This court's standard of review for a determination by the Public Utilities Commission is set forth in R.C. 4903.-13.

R.C. 4903.13 provides:

"A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable."

[6] Under the "unlawful" or "unreasonable" standard of R.C. 4903.13, this court will not reverse or modify a determination unless that determination is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *Delphos v. Pub. Util. Comm.* (1940), 137 Ohio St. 422, 424, 30 N.E.2d 688; *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 330 N.E.2d 1, paragraph eight of syllabus; and *General Motors Corp. v. Pub. Util. Comm.*

*phone Co.* (1976), 74-161-TP-AIR, 15 PUR 4th 344. The contributions which the commission has approved in the *Ohio Bell* opinion and in the past have not exceeded 0.10 percent of gross test-year operating revenues. The charitable contributions at issue in the instant cause amount to about a 0.11 percent of the gross test-year operating revenues. We do not find this amount of deviation from 0.10 percent sufficient to render the commission's inclusion of charitable contributions as operating expenses to the instant cause unreasonable or unlawful.



(1976), 47 Ohio St.2d 58, 351 N.E.2d 183, paragraph two of the syllabus.

The commission's federal income tax and test-year expense calculations are not manifestly against the weight of the evidence.

[7] In its fourth proposition of law, the city challenges as unreasonable and unlawful "the establishment of rates based on an allowance for federal income taxes in excess of the company's actual tax liability." To begin with, the record reveals that any discrepancies which may exist between the company's effective tax rate and the rate applied by the staff were not due to consolidation. Therefore, the city's reliance on *Federal Power Commission v. United Gas Pipe Line Co.* (1967), 386 U.S. 237, 87 S.Ct. 1003, 18 L.Ed.2d 18, is misplaced. Moreover, the record does not clearly indicate that the staff applied a 48 percent corporate tax rate when it calculated the company's federal income tax liability for rate-making purposes. (The witness who mentioned a 48 percent tax rate merely stated that the 48 percent tax rate used to calculate the federal income tax would be on revenues accrued after the company received rate relief. In addition, since the company in the instant cause is a flow-through company for accounting purposes and the staff accountants started with the tax expense recorded in the utility's books, it is likely that the difference in the effective tax rate and the 48 percent rate was reflected in the staff's figures.) In light of the above evidence, we cannot say that the commission's calculation of federal income taxes is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *General Motors Corp., supra.* The city's fourth proposition of law is, therefore, overruled.

The last calculation challenged by the city is the test-year expense figure used by the commission. Since the record reveals that the test-year expenses recommended by the staff did not include an adjustment for post-year wage increases,[4] we find this argument to be without merit, and we find it unnecessary to address the issue of whether such wage increases may be considered in test-year expenses. The city's sixth proposition of law is thereby overruled.

III.

[8] The city also challenges three rate increases ordered by the commission. The first rate increase which the city takes exception to is the commission's application of a nine cent per thousand cubic foot earnings erosion charge. While it is true that the commission applied a uniform earnings erosion charge to the city and noncity areas serviced by the company even though the greatest proportion of the eroded earnings occurred outside the city, the application of that rate in the instant cause is not unreasonable or unlawful. The commission found that establishing a uniform earnings erosion rate was justified because the gas made available by the interrupted service causing the earnings erosion "is of benefit to *all* its firm customers, without regard to the chances of municipal boundaries." In light of the testimony at the rate increase hearing that the gas not delivered to interruptible customers becomes available to the entire system, including the city of Cincinnati, we cannot say that the commission's determination was manifestly against the weight of the evidence or that its establishment of a nine cent earnings erosion charge was unreasonable or unlawful. The city's first challenge to the rates imposed upon it is therefore overruled.

[4]In the Staff Report of Investigation in the case involving customers in Cincinnati, the staff incorporated by reference all accounting recommendations contained in the Staff Report in the case involving customers in unincorporated areas. The latter Staff Report recommended that no adjustments should be made for the test-year cost increases.



[9] The second rate challenged by the city is the uniform rate imposed on it by the commission. The city argues that the commission's application of a uniform rate should not be sustained because the record reveals no substantial evidence supporting the establishment of uniform rates. At the hearing, the company presented testimony that traditional wisdom concerning the cost of providing gas to city and noncity residents no longer applies and that, instead, the cost of noncity service has so decreased and the cost of city service has so increased that a uniform rate is justifiable. In support of that position, the utility's witness cited the increasing density of noncity populations which lowers noncity service cost, the age of the city's plant, the location of its pipelines and the numbers of the city's uncollectable accounts which raise its service costs and the ever-increasing percentage of cost which is attributable to expenses like gas purchases which remain the same regardless of whether the customer is a city or a noncity resident. In light of that testimony, we cannot agree with appellant that the commission's prescription of a uniform rate is manifestly against the weight of the evidence. The city's second challenge to the commission's rate determinations is without merit.

[10, 11] The city's third challenge to the rates imposed on it by the commission is that "the overall rate of return of 7.74 percent was also unlawful." We disagree. Of the two expert witnesses testifying before the commis-

sion, one suggested as fair and reasonable a rate of return of 8.8 percent to 10.2 percent. The commission's staff witness suggested a wider range, including the 7.74 percent finally adopted. In the absence of evidence refuting this testimony, we do not find that overall rate of return to be unlawful or unreasonable. The city contends further that despite the expert testimony supporting a 7.74 percent rate of return as reasonable, the rate of return adopted by the commission was *per se* unreasonable because the commission relied on an excessive estimate of the company's rate of return on common equity to arrive at the 7.74 percent figure. Even if we assume, *arguendo*, that the 12 to 13 percent rate of return on common equity figure adopted by the commission is excessive *per se*, we cannot find that the 7.74 percent rate of return was excessive in the absence of evidence showing a direct correlation between the rate of common equity and the rate of return. We therefore find that the commission's adoption of a 7.74 percent rate of return was reasonable and lawful. The city's final challenge to the rates imposed on it by the commission is, therefore, without merit.

The orders of the Public Utilities Commision being neither unreasonable nor unlawful are accordingly affirmed.

C. WILLIAM O'NEILL, C. J., and HERBERT, WILLIAM B. BROWN, PAUL W. BROWN and SWEENEY, JJ., concur.

CELEBREZZE, J., concurs in the judgment.

LOCHER, J., dissents.

LOCHER, Justice, dissenting.

I must respectfully dissent.

The majority opinion inexorably leads to the ratepayers shouldering the expense of a public utility's (a monopoly guaranteed by the state) charitable contributions.



Citing three cases that permit expense of charitable contributions of a utility to be charged to the ratepayers and referring to a comment in Priest, Principles of Utility Regulation (1969), at page 87, that contributions by utilities are frequently less than voluntary, the opinion rather nonchalantly accepts a passing of these costs on to the ratepayers as if no other result were conceivable.

In my prior dissent in *Franklin Co. Welfare Rights Org. v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 1, 377 N.E.2d 990, I quoted at length from an opinion of the Supreme Court of Alabama,[5] wherein that august body, with good justification, declined the opportunity to burden the utility ratepayers with the charitable contributions of the public utility. The issue of whether the ratepayer should be required in his or her utility bill to pay for the utility's donations was not directly before this court in *Franklin Co. Welfare Rights Org., supra.* The issue now properly before this court, and thus I have had the opportunity to closely examine its resolution in other jurisdictions. An examination reveals that, since 1972, this issue has been addressed in approximately 30 states, not including Ohio.[6] Of those states, 23 have taken the path rejected by the majority and have, in the normal course, refused to allow a public utility to charge its ratepayers for its donations. Only a mere six states, including New York, as noted by the majority, have allowed recoupment of these donations from the utility's consumers.[7] The Illinois Supreme Court, in *Illinois Bell Telephone Co. v. Illinois Commerce Comm.* (1973), 55 Ill.2d 461, 303 N.E.2d 364, 3 PUR

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[5] *Alabama Power Co. v. Alabama Public Service Comm.* (Ala. 1977), CCH Pub. Util. Law Rptr., New Matters.

[6] 3 PUR Digest, 2d Series, 1977 Supp., Expenses, Section 46.

[7] Conflict apparently exists between the Supreme Court of Washington and the commission with regard to this issue.

4th 36, at page 480 of its opinion, noted the commission's reference to *Virtjak v. Illinois Bell Telephone Co.* (Ill.1959), 32 PUR 3d 385, but then held that the utility's charitable contributions were not operating expenses cognizable for the purposes of rate-making. Apparently, none of our neighboring states in the normal course permits a public utility to charge its charitable contributions to its consumers. *Re Indianapolis Power & Light Co.* (Ind.1975), 9 PUR 4th 86; *Re Union Light, Heat & Power Co.* (Ky.1953), 97 PUR N.S. 33; *Re Potomac Edison Co. of W. Va.* (W.Va.1974), 6 PUR 4th 183; *Bainbridge Motor Co. v. General Telephone Co. of Pa.* (Pa.1975), 12 PUR 4th 416; *Re Detroit Edison Co.* (Mich.1970), 83 PUR 3rd 463.[8]

I wish at this point to emphasize that I am *not* urging that utilities be prohibited from making contributions but only that they be precluded from charging them against their ratepayers. Furthermore, I have no doubt as to the importance of these contributions to the donees, or that these donations are devoted to beneficial uses. I do believe, however, that it is grossly improper to permit a utility to charge its customers for the utility's charitable contributions.

The Supreme Court of California, in *Pacific Tel. & Tel. Co. v. Public Util. Comm.* (1965), 62 Cal.2d 634, 44 Cal. Rptr. 1, 401 P.2d 353, held that a utility's attempt to charge all of its own contributions as an operating expense to be borne by the ratepayers was plainly unwarranted. Relying upon the observations of the Public Utilities Commission of California in its decision, the California Supreme Court quoted with approval the following

[8] Contra: *Re Michigan Bell Telephone Co.* (Mich. 1975), Case No. U-4575.



portion thereof, at page 668, 44 Cal.Rptr. at page 22, 401 P.2d at page 374.

"Dues, donations and contributions if included as an expense for rate making purposes, become an involuntary levy on ratepayers, who, because of the monopolistic nature of utility service, are unable to obtain service from another source and thereby avoid such a levy. Ratepayers should be encouraged to contribute directly to worthy causes and not involuntarily through an allowance in utility rates. [Pacific] should not be permitted to be generous with ratepayers' money but may use its own funds in any lawful manner.'"

The Illinois Supreme Court, in *Illinois Bell Telephone Company, supra,* 55 Ill.2d at page 481, 303 N.E.2d at page 375, stated:

"* * * [We] conclude that the allowance of such contributions as operating expenses for purposes of rate making constitutes an involuntary assessment on the utility's patrons, and we question the propriety of Bell's being permitted to thus dispense largesse at their expense."

The Colorado Public Utilities Commission, in *Re Mountain States Telephone & Telegraph Co.* (1972), 96 PUR 3d 321, 326, expressed its opinion on this issue as follows:

"Donations and charitable contributions are made purely at management discretion, accrue to the benefit of the corporation and its owners and should be borne by the stockholders rather than ratepayers * *."

The North Carolina Utilities Commission echoed a similar sentiment in *Re Virginia Electric & Power Company* (1975), 11 PUR 4th 115, wherein it stated, at page 124:

"* * * The commission is of the opinion that charitable and educational donations is [*sic*] an expense which

should be borne by the company's stockholders, not its ratepayers. The ratepayers have no voice in determining to which charities and institutions, if any, the donations are to be made. The ratepayers should not be made involuntary donors to charitable and educational institutions through the payment of electric rates."

In *Re Chesapeake & Potomac Telephone Company of W. Va.* (1977), 22 PUR 4th 197, the utility argued that the charitable contributions were not to enhance the company's image but were made as a result of its obligation to perpetuate the social well-being of the community it services. It, thus, contended that the ratepayer will ultimately benefit from such contributions and therefore they should be included in the cost of service. The West Virginia Public Service Commission responded, at page 205, in the following manner:

"While it is true that such contributions to local service areas do benefit the communities served, they also tend to upgrade the company's public image and therefore work more to the benefit of the utility and its stockholders than to the benefit of the subscribers. Such an undertaking should be financed by the ownership rather than the utility customers and to allow these expenditures to be treated as an item of operating expense would be to require an involuntary contribution by ratepayers to charities which they may or may not otherwise support."

Apart from other jurisdictions, the Ohio Public Utilities Commission (commission), in *East Ohio Gas Co. v. Cleveland* (1934), 4 PUR N.S. 433, disallowed the utility's claim as an expense of its contributions to the Cleveland community fund, stating that it is the right of the stockholders to make such contributions if they desire, but that it would be unfair to permit them to be reim-



bursed for such expenditures from the customers of the company, who may have already been contributing to the same cause. Adhering to this same principle the commission again rejected the utility's contention that donations were operating expenses in *Re Springfield Gas Co.* (1937), 19 PUR N.S. 1, stating at page 17:

"* * * It has been universally held that donations to charitable and religious institutions and to civic organizations and clubs * * * while evidence of the company's interest in public welfare and the upbuilding of the community and its participation in public activities, are to come out of surplus and not chargeable to the ratepayers through the medium of operating expenses. It is generally recognized that ratepayers themselves are likewise making similar contributions."

The commisson has not been steadfast in its deviation from prior decisions. In *Re Cleveland Electric Illuminating Co.* (1973), 3 PUR 4th 259, the commission recognized that it had not established a clear precedent as to the allowance or disallowance of charitable contributions as an appropriate item of expense for rate-making purposes. Cognizant of its earliest decisions wherein such donations were disallowed, followed by a period wherein such contributions were an allowable expense, the commission in that cause found that of the $636,149 of charitable contributions during the test year only $300,000 was to be allowed for rate-making purposes. The commission then concluded its discussion on this subject, at page 274, with the following remarks:

"Moreover, we hereby signal the industry that we are moving towards a policy decision that charitable contributions should *not* be included at all as an appropriate item for rate base purposes."

It is evident that the commission has in recent years, for reasons not clearly expressed, never implemented the rule it announced in 1973. See *Re Ohio Bell Telephone Co.* (1976), 15 PUR 4th 344.

This issue is a matter of first impression before this court. Given the apt reasoning expressed in other states for disallowing a utility's attempt to charge its own contributions to its customers, the early decisions of Ohio which similarly refused to consider these donations for rate-making purposes and unjustified oscillation of the commission since its early decisions on this issue which has been repeatedly and consistently raised by concerned consumers, I am constrained to conclude that the charitable contributions of a utility, a monopoly with a guaranteed fair rate of return, should not be involuntarily borne by the consumer, who cannot obtain this service from another source, but should instead be the responsibility of the utility's shareholders, who not only control the company but share in its guaranteed profits. Moreover, in light of the General Assembly's recent concern with utility rates, as is readily discernible from its discarding of the old RCNLD standard (see my dissent in *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155, _____ N.E.2d _____) and its recent establishment of the Public Utilities Commission Consumers' Counsel, R. C. Chapter 4911, the majority's opinion clearly is contra to the implied intentions of the General Assembly.

I am further in disagreement with the majority's summarily affirming the commission's action of severing the cases involving the municipalities and unincorporated areas. Despite protestations that its decision with respect to these two causes in approving uniform rates and the nine cent earnings erosion adjustment did not automatically deny the city of Cincinnati a different rate or a



lower erosion adjustment, the plain facts are that the commission eventually approved both the nine cent earnings erosion adjustment and the uniform rate in the cause involving Cincinnati. Having dwelt on the issue of charitable contributions in such an extended manner, I will not attempt an in-depth analysis of this facet of the instant case. I believe it is sufficient to state that these actions of the commission have the appearance of impropriety and, when combined with the highly technical parlance of engineering and accounting inherent within a rate case, this court should not so lightly grant its *imprimatur.*

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## APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO

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| *THE STATE OF OHIO,* )<br>*City of Columbus.* ) | 1978 Term. | |
| To wit: September 7, 1978 | | |
| The City of Cincinnati,<br>Appellant,<br>vs | ) | No. 76-1230 &<br>76-1326 |
| Public Utilities Commission<br>et al.,<br>Appellees. | ) | REHEARING |

*It is ordered by the court that rehearing in this case is denied.*

*I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ___ Page ___*

*IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 7th day of September, 1978.*

*THOMAS L. STARTZMAN, Clerk.*

*By* _____ *Deputy.*



## APPENDIX D

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

| | |
|---|---|
| In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in its Gas Rates under the Direct Jurisdiction of The Public Utilities Commission of Ohio. | Case No. 74-581-GA-AIR |
| In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in its Gas Rates in the Sixty-Three Municipalities set forth in the Application. | Case No. 75-641-GA-AIR |

### OPINION AND ORDER

The Commission, coming now to consider the above-entitled applications filed pursuant to Section 4909.18 Revised Code, the exhibits filed therewith, the respective Secretary's Reports of Investigation issued pursuant to Section 4909.19 Revised Code, having appointed its Attorney Examiners, Barth E. Royer and Helen L. Liebman, pursuant to Section 4901.18 Revised Code to conduct a public hearing and to certify the record directly to the Commission, the testimony and exhibits introduced at the public hearing commencing on July 12, 1976, the stipulation and recommendation entered into by applicant, the Commission's staff, and intervenors Armco Steel Corporation and the City of Middletown,

and being otherwise fully advised in the premises and in compliance with Section 4903.09 Revised Code, hereby issues its Opinion and Order.

HISTORY OF THE PROCEEDINGS:

The Cincinnati Gas & Electric Company, the applicant herein, is an Ohio corporation authorized to engage in the business of purchasing, distributing, and selling natural, synthetic, and liquified petroleum gas. Applicant is a public utility and a natural gas company within the definitions of Sections 4905.02 and 4905.03 Revised Code, and as such is subject to the jurisdiction of this Commission pursuant to sections 4905.04, 4905.05, and 4905.06 Revised Code.

On September 4, 1974, applicant filed its application in Case No. 74-581-GA-AIR, seeking authorization for a general increase in its charges for gas service to customers in unincorporated areas and for certain sales to customers which are not covered by ordinance in incorporated municipalities. The Secretary's Report of Investigation was issued and served, pursuant to Section 4909.19 Revised Code, on February 27, 1976.

On March 25, 1975, applicant filed its application in Case No. 75-205-GA-AIR for an increase in certain of its gas rates in the City of Cincinnati previously set by ordinance contract. On August 20, 1975, applicant filed its application in Case No. 75-641-GA-AIR for an increase in its gas rates in sixty-three named municipalities, which rates had been previously set by municipal ordinance contracts. A joint Secretary's Report of Investigation was issued and served in Cases No. 75-205-GA-AIR and 75-641-GA-AIR, pursuant to statute, on May 28, 1976.

By appropriate entries in each of the three cases, the Commission has approved June 30, 1974 as the date certain and the twelve months ended December 31, 1974 as the test year.



By order dated June 9, 1976, the three cases, which together embrace all of applicant's retail gas service subject to the jurisdiction of this Commission, were consolidated for hearing. Public hearings commenced on July 12, 1976 in the Cincinnati City Council Chambers and continued thereafter at the offices of the Commission. At the hearing on July 14, 1976, applicant, the Commission's staff, and intervenor Armco Steel Corporation submitted a stipulation and recommendation with respect to Case Nos. 74-581-GA-AIR and 75-641-GA-AIR, stipulating certain pre-filed testimony into evidence, waiving cross-examination and making certain joint recommendations to the Commission (Jt. Ex. 1; R. Vol. III, p. 41 et seq.). Because the City of Cincinnati, a party to Case No. 75-205-GA-AIR, declined to join in a similar stipulation and recommendation as to that proceeding (Jt. Ex. 2), applicant, the Commission's staff, and Armco joined in a motion requesting that Case Nos. 74-581-GA-AIR and 75-641-GA-AIR, being ripe for decision, be severed from Case No. 75-205-GA-AIR for purposes of decision (R. Vol. III, p. 57). The motion was opposed by the City of Cincinnati and the presiding hearing examiner reserved ruling (R. Vol. III, p. 71). The proceedings are now before the Commission on the motion to sever and, if that motion is granted, for decision on the merits.

APPEARANCES:

Messrs. Squire, Sanders, & Dempsey, by Messrs. Alan P. Buchmann, William C. Donahue, and Philip S. Schaefer, 1800 Union Commerce Building, Cleveland, Ohio, and Mr. William J. Moran, General Counsel, Mr. James J. Mayer, 139 East Fourth Street, Cincinnati, Ohio, on behalf of the Applicant.

Mr. William J. Brown, Attorney General of Ohio, by Messrs. John W. Bentine and Samuel C. Randazzo, Assistant Attorneys General, 111 North High Street, Columbus, Ohio, on behalf of the staff of The Public Utilities Commission of Ohio.

Messrs. Steer, Strauss, Which & Tobias, by Messrs. Robert J. White, Bruce F. Abel and Jay J. Dudley, 2208 Central Trust Tower, Cincinnati, Ohio, on behalf of Armco Steel Corporation.

COMMISSION REVIEW AND DISCUSSION:

The Cincinnati Gas & Electric Company distributes natural gas to 303,352 customers located in over sixty incorporated communities and contiguous territories in southwestern Ohio. The present applications affect sales to almost all such customers in all gas service classifications.

The rates and charges presently in effect for applicant's customers subject to Case No. 74-581-GA-AIR were authorized by this Commission in Case No. 36,586, by Order dated February 26, 1973, and were fixed based on a test year of the twelve months ended June 30, 1970. The rates and charges presently in effect for applicant's customers subject to Case No. 75-641-GA-AIR were established by municipal ordinances enacted at various times and which have expired or been terminated prior to the filing of the application. It is applicant's announced intention to bring all of its retail gas service within the jurisdiction of this Commission and to establish uniform rates throughout its service territory for the several classes of customers served.

Applicant, the Commission's staff, and intervenors Armco Steel Corporation and the City of Middletown,



have joined in a stipulation and recommendation in which they jointly recommend that applicant be authorized to place in effect rates which would yield it an increase of $5,527,000 in Case No. 74-581-GA-AIR and an increase of $6,327,000 in Case No. 75-641-GA-AIR, based on the 1974 test year in both cases (Jt. Ex. 1; Jt. Ex. 3). In effect this is an agreement by applicant to accept only 92% of its requested rate increases (the reduction being distributed uniformly) in the interest of securing a prompt decision, even though the parties to the stipulation agree that, if these cases were fully litigated, applicant could, in all probability, justify higher rates (Jt. Ex. 1, para 1). In addition, the parties recommend that insofar as these proceedings are concerned, applicant be authorized to institute uniform rates as prayed for in the applications (as amended) and that applicant be authorized to add to each of the rate steps 0.9 cents per 100 cubic feet or 9.0 cents per thousand cubic feet in order to compensate it for the erosion in earnings attributable to reduced gas supply and correspondingly reduced gas sales. No party to these two proceedings has objected to these recommendations.

The first question before the Commission is whether the joint motion to sever these two cases from Case No. 75-205-GA-AIR for purposes of decision should be granted. The motion was opposed by intervenor City of Cincinnati, a party only to Case No. 75-205-GA-AIR. Cincinnati's principal grounds appear to be that (1) discussions relative to settlement between the Commission's staff and applicant preceded discussions with the City and (2) a Commission decision in these cases could prejudice the City's position on matters placed in issue in Case No. 75-205-GA-AIR. As to the first argument, if it be at all a proper objection to severance, the record shows that

the City was not only carefully informed of the negotiations, but participated therein. As the hearing examiner aptly pointed out, discussions of this sort must start somewhere (R. Vol. III, p. 60). Not only is criticism of the Commission's staff unjustified, but, on the contrary, the staff should be commended for initiating discussions which expedite the regulatory process and which lead, if the recommendations are accepted, to lower rates than might otherwise be authorized.

Insofar as the second objection is concerned, the City mistakes the point. The Commission must determine a case pending before it on the record in that case. Thus, while there may be similar issues in these cases and in Case No. 75-205-GA-AIR, a decision in these cases cannot possibly prejudice the City if the record in Case No. 75-205-GA-AIR supports a different conclusion. Put another way, on the City's theory, no case could be decided which might impact upon another until the second was heard and submitted. However, this Commission regularly decides cases which involve issues similar to those in other pending cases and finds no difficulty in deciding each case on its own record.

It is clear that these cases are ripe for decision. These cases were consolidated for hearing as a matter of convenience and, the reason for consolidation for hearing having disappeared, surely there is no *right* to a continued consolidation. The Commission is of the opinion, and so finds, that the motion for severance should be granted.

This brings us to the merits. As already noted, the parties have submitted a joint recommendation. The Commission is, of course, not bound by such a recommendation; however, a joint recommendation of applicant and the Commisson's staff, in circumstances such as these, is entitled to careful consideration and should not be lightly



regarded. The question, therefore, is whether the recommendation is supported by the record. In making that determination, there is no need for the Commission to decide issues which will have no impact on the result and, conversely, no inference should be drawn from the Commission's decision in these proceedings as to its position on matters not necessary for the decision, including those which may be contested in Case No. 75-205-GA-AIR.

## RATE BASE

In Case No. 74-581-GA-AIR, applicant submitted exhibits and testimony in support of the value of its property actually used and useful in the rendition of the gas service involved as of June 30, 1974. The depreciated reproduction cost new of such property as estimated by applicant may be summarized as follows:

| | |
|---|---|
| Reproduction Cost New (Allocated) | $137,320,000 |
| Less Existing Depreciation | 28,059,000 |
| Reproduction Cost New Less Deprec. | $109,261,000 |
| Working Capital | 4,616,000 |
| Rate Base | $113,877,000 |

The independent investigation of the Commission's staff supports the following estimates of the property actually used and useful in the rendition of the affected gas service:

| | |
|---|---|
| Reproduction Cost New (Allocated) | $137,302,000 |
| Less Existing Depreciation | 36,201,000 |
| Reproduction Cost New Less Deprec. | $101,101,000 |
| Working Capital | - - - - - |
| Rate Base | $101,101,000 |

As can be readily seen, the principal differences between applicant and the Commission's staff relate to rate base depreciation and working capital. In view of the stipulation and recommendation already described, there is no need for the Commission in *these* proceedings to resolve those differences, since it is apparent that, if applicant is entitled to the recommended relief on the staff's rate base, it is surely entitled to it on applicant's rate base and there is no evidence in the record to support any lower rate base determination. The Commission, therefore, finds that the value of applicant's property used and useful in the rendition of natural gas service to its customers involved in Case No. 74-581-GA-AIR is not less than $101,101,000.

In Case No. 75-641-GA-AIR, applicant submitted exhibits and testimony in support of the value of its property actually used and useful in the rendition of gas service involved as of June 30, 1974. The depreciated reproduction cost new of such property as estimated by applicant may be summarized as follows:

| | |
|---|---|
| Reproduction Cost New (Allocated) | $99,367,000 |
| Less Existing Depreciation | 20,878,000 |
| Reproduction Cost New Less Deprec. | $78,489,000 |
| Working Capital | 3,093,000 |
| Rate Base | $81,582,000 |

The independent investigation of the Commission's staff supports the following estimates of the property actually used and useful in the rendition of the affected gas service:

| | |
|---|---|
| Reproduction Cost New (Allocated) | $99,054,000 |
| Less Existing Depreciation | 24,548,000 |



| | |
|---|---|
| Reproduction Cost New Less Deprec. | $74,506,000 |
| Working Capital | - - - |
| Rate Base | $74,506,000 |

As in Case No. 74-581-GA-AIR, the principal differences between applicant and the staff relate to rate base depreciation and working capital. For the reasons previously expressed, there is no need for extended discussion of these differences. The Commission accordingly finds that the value of applicant's property used and useful in the rendition of natural gas service to its customers involved in Case No. 75-641-GA-AIR is not less than $74,506,000.

## REVENUES AND EXPENSES

In Case No. 74-581-GA-AIR, applicant submitted exhibits and testimony setting forth its determination of the allocated revenues derived and expenses incurred in rendering natural gas service during the test year under its present and proposed rates. The applicant's caculations regarding its present rates may be summarized as follows:

| | | |
|---|---|---|
| Operating Revenues | | $59,297,000 |
| Operating Expenses | $55,228,000 | |
| FIT | 835,000 | |
| Total Operating Deductions | | 56,063,000 |
| Income Available for Fixed Charges | | $ 3,234,000 |

Under the rates for service for which applicant seeks authorization, it submits that the annual revenues and expenses would be as follows:

| | | |
|---|---|---|
| Operating Revenues | | $65,649,000 |
| Operating Expenses | $55,470,000 | |
| FIT | 3,768,000 | |

| | |
|---|---|
| Total Operating Deductions | 59,238,000 |
| Income Available for Fixed Charges | $ 6,411,000 |

In compliance with the provisions of Section 4909.19, Revised Code, the Commission's accounting staff investigated the matters set forth in the application and related exhibits. The Secretary's Report, as amended (Staff Ex. 3), shows that the staff found applicant's revenues and expenses during the test year at its present rates, after the adjustments detailed in said Report, to be as follows:

| | | |
|---|---|---|
| Operating Revenues | | $57,899,000 |
| Operating Expenses | $54,891,000 | |
| FIT | 184,000 | |
| Total Operating Deductions | | $55,075,000 |
| Income Available for Fixed Charges | | $ 2,824,000 |

The Secretary's Report also discloses that under applicant's proposed rates the annual revenues for the test year would have been as follows:

| | | |
|---|---|---|
| Operating Revenues | | $64,252,000 |
| Operating Expenses | $55,134,000 | |
| FIT | 3,117,000 | |
| Total Operating Deductions | | $58,251,000 |
| Income Available for Fixed Charges | | $ 6,001,000 |

The inconsistency between applicant's and the staff's determination of adjusted revenues and expenses is the result of a number of relatively minor differences, many of which are the subject of applicant's objections. As with rate base, in view of the stipulation and recommendation already described, extensive discussion of those points is not required, and no decision on the several objections need be reached. The Commission, therefore, for purposes of these proceedings, accepts the findings of the



staff and finds that applicant's income available for fixed charges under its present rates during the test year was $2,824,000 and that, under its proposed rates, this income would have been $6,001,000.

This, however, does not end the matter. As noted, the staff has recommended, and all parties have agreed, that applicant be allowed, not the full requested increase, but only an increase of $5,527,000 in this case. Thus, adjusting the income account accordingly, the Commission finds that, if that recommendation is accepted, applicant's income available for fixed charges in the test year would have been $5,588,000.

In Case No. 75-641-GA-AIR, applicant submitted exhibits and testimony setting forth its determination of the allocated revenues derived and expenses incurred in rendering natural gas service during the test year under its present and proposed rates. The applicant's calculations regarding its present rates may be summarized as follows:

| | | |
|---|---|---|
| Operating Revenues | | $33,739,000 |
| Operating Expenses | $32,133,000 | |
| FIT | (17,000) | |
| Total Operating Deductions | | 32,116,000 |
| Income Available for Fixed Charges | | $ 1,623,000 |

Under the rates for service proposed in the application, applicant submits that the annual revenues and expenses would be as follows:

| | | |
|---|---|---|
| Operating Revenues | | $40,462,000 |
| Operating Expenses | $32,399,000 | |
| FIT | 3,082,000 | |
| Total Operating Deductions | | $35,481,000 |
| Income Available for Fixed Charges | | $ 4,981,000 |

In compliance with the provisions of Section 4909.19, Revised Code the Commission's accounting staff investigated the matters set forth in the application and related exhibits. The Secretary's Report of Investigation, as amended (Staff Ex. 3), discloses the staff's finding that applicant's revenues and expenses during the test year at its present rates, after the adjustments explained in said Report, were as follows:

| | | |
|---|---|---|
| Operating Revenues | | $35,015,000 |
| Operating Expenses | $32,914,000 | |
| FIT | 180,000 | |
| Total Operating Deductions | | $33,094,000 |
| Income Available for Fixed Charges | | $ 1,921,000 |

The Secretary's Report also discloses that, in the staff's view, under applicant's proposed rates the annual revenues for the test year would have been as follows:

| | | |
|---|---|---|
| Operating Revenues | | $42,025,000 |
| Operating Expenses | $33,186,000 | |
| FIT | 3,414,000 | |
| Total Operating Deductions | | 36,600,000 |
| Income Available for Fixed Charges | | $ 5,425,000 |

As in Case No. 74-581-GA-AIR, the inconsistency between applicant's and the staff's determination of adjusted revenues and expenses is the result of a number of relatively minor differences, many of which are the subject of applicant's objections. As with rate base, in view of the stipulation and recommendation already described, extensive discussion of these points is not required and the objections need not be resolved on their merits. The Commission, therefore, accepts the findings of the staff and finds that applicant's income available for fixed charges under its present rates during the test year was $1,921,000



and that under its proposed rates, this income would have been $5,425,000.

Again, however, this does not end the matter. As noted, the staff has recommended, and applicant has agreed, that applicant be allowed, not the full requested increase, but only an increase of $6,327,000 in this case. Thus, adjusting the income account accordingly, the Commission finds that, if that recommendation is accepted, applicant's income available for fixed charges in the test year would have been $5,081,000.

## RATE OF RETURN

Applying the dollar return under present rates of $2,824,000 found in Case No. 74-581-GA-AIR to the rate base of $101,101,000 as determined above, yields a rate of return of 2.79%. The Commission finds that this is insufficient to provide applicant with reasonable compensation for the gas service rendered.

Applying the dollar return under present rates of $1,921,000 found in Case No. 75-641-GA-AIR to the rate base of $74,506,000 as determined above for that case, yields a rate of return of 2.58%. Again, the Commission finds that this is insufficient to provide applicant with reasonable compensation for the gas service rendered subject to that case.

If the recommendation of applicant and the Commission's staff is accepted, the proposed rates, reduced in accordance with that recommendation, would yield applicant a rate of return of 5.53% on the rate base in Case No. 74-581-GA-AIR and of 6.82% on the rate base in Case No. 75-641-GA-AIR. The testimony of applicant's witness Melnyk (App. Ex. 10), using a methodology familiar to this Commission and accepted by it in prior cases, recommends a fair rate of return in the range of 8.8% to 10.2%. While the testimony of staff witness Loconto, filed to-

gether with the Secretary's Report of Investigation in Case No. 74-581-GA-AIR, recommends a considerably wider range, depending upon interpretation of Ohio law, the Commission notes that that testimony was filed prior to the recent decision of the Supreme Court in *General Telephone Company v. PUCO*, 46 Ohio St. 2d 281 (1976). The indicated rates of return under the recommendation are well within the limits of Mr. Loconto's testimony when applied in accordance with that decision and it has been stipulated that Mr. Loconto, if called, would have testified that the recommended rates would result in rates of return which, in his opinion, would not be unreasonable under the facts of these cases and the law of Ohio (Jt. Ex. 1). The Commission notes that the recommendation results in different *rates of return* (but not different *rates*) in the two rate areas involved. The Commission has, however, previously approved different rates of return in separate rate areas served by the same utility, particularly as in this case, where those rate areas are part of the same economic community, see *Columbus v. Columbus and Southern Ohio Electric*, 171 0.5.38 (1960); *Columbus and Southern Ohio Electric*, Case Nos. 72-903-Y, 73-841-Y (1974). The Supreme Court has recently held that identical *rates of return* from different rate areas are not required by Ohio law, *General Telephone Company, supra.* Accordingly, the Commission finds that the rates of return of 5.53% in Case No. 74-581-GA-AIR and 6.82% in Case No. 75-641-GA-AIR, on the respective rate bases as previously found, are not unjust or unreasonable and should be approved. Applicant has expressly agreed to these conclusions. The Commission further finds, therefore, that the recommendation of the parties, in this respect, should be approved as being supported by the record.



## UNIFORM RATES

As previously noted, applicant has heretofore operated, in a large portion of its service area and with respect to a large number of its customers, under municipal ordinance rates, not subject to the jurisdiction of this Commission. It now proposes to establish uniform rates for gas service and we take notice of the fact that it has pending before the Commission a similar request with respect to its electric service. Case Nos. 74-845-EL-AIR, 75-70-EL-AIR, 75-495-EL-AIR, 75-718-EL-AIR, and 76-302-EL-FAC. The staff reports expressly describe uniform rates as "desirable" and the stipulation and recommendation (Jt. Ex. 1), in which the staff and Armco have joined, recommends uniform rates. While obviously the Commission cannot completely resolve this issue, owing to the continued pendency of the City of Cincinnati case, there is no evidence in the record in these cases militating against this recommendation. On the contrary, the evidence shows that one of the principal reasons for *non*-uniform rates was not any question of cost of service, but a matter of the primary jurisdiction of municipalities in the Ohio rate making process. That is, the applicant was able to obtain rate increases more quickly under municipal regulation and thus was willing to accept smaller amounts. It is the applicant's belief that this situation no longer obtains (R. Vol. II, p. 14). Without in any way prejudicing the similar issue raised in Case No. 75-205-GA-AIR, which must be decided on its own record, the Commission finds this recommendation to be reasonable and is of the opinion that it should be approved.

## EROSION ADJUSTMENT

Applicant proposes an adjustment in the amount of 0.9 cents per hundred cubic feet or 9 cents per thousand cubic

feet to take into account the decline in available gas supplies. In effect, without this adjustment, applicant would earn, on an overall basis, somewhat less than the rates of return heretofore approved if we assume that the decreased 1975 sales volumes were experienced in the test year (6.35% as opposed to 6.57% on a system wide basis (R. Vol. II, p. 5, 6)). The decreased sales volumes are a fact and the evidence shows that there is no expectation of restored volumes in the foreseeable future when the rates approved by this Order will be in effect. Ratemaking is prospective and to approve a rate of return based upon 1974 data, when the record shows that that data will be inapplicable in the future, would mean that applicant could under *no* circumstances realize the rates of return found just and reasonable. The Staff's Report has recognized this problem (Schedule 19) and the Staff and intervenors have joined in applicant's recommendation. For the purposes of these cases, we find applicant's proposal to be reasonable and authorize applicant to add to each step of the rates 0.9 cents per hundred cubic feet or 9 cents per thousand cubic feet to account for this erosion. The Commission has previously authorized a similar adjustment with respect to Dayton Power and Light Company (Case No. 73-166-Y (August 19, 1975)).

## ADDITIONAL CONSIDERATIONS

Several additional matters require notice. Applicant has proposed to conform its Service Regulations to those accepted for filing by this Commission in applicant's most recent electric rate case, No. 72-415-Y. Although not covered in the stipulation and recommendation, we are aware of no objections to this proposal. Absent some reason for different terms and conditions of service for the gas and electric operations of a combination company,



the Commission believes they should be conformed and so finds.

The stipulation and recommendation (Jt. Ex. 1) recommends that the minimum bill provision of proposed Rate Sheet F-C (O.S. No. 30) be revised to read:

> "Minimum: $100,000 per month except this sum shall be reduced pro rata in any month in which firm curtailment is ordered by the Company."

This is the present minimum bill for this tariff. Applicant had proposed to increase the minimum to $250,000 per month. The record shows, however, that applicant serves only one customer on this tariff (Armco) and that the proposed increase in the minimum bill, based on the test year experience, would have no revenue effect (App. Ex. 9, Schedule 17). Accordingly, the Commission believes, and so finds, that this recommendation should be approved.

Applicant originally proposed certain adjustments to its purchased gas adjustment clause. The staff concurred with applicant's proposal except to the extent that it would include excise taxes, suggesting that the latter question be deferred until a uniform purchases gas adjustment clause policy can be adopted (R. Vol. III, p. 127). Applicant, in the stipulation and recommendation referred to (Jt. Ex. 1), has withdrawn its proposal with respect to excise taxes. There is, therefore, no matter in controversy with respect to this issue and the Commission believes, and so finds, that applicant's proposed purchased gas adjustment clause (as so modified) should be approved.

In the respective Secretary's Reports, the staff recommended that applicant's depreciation accrual rates be reviewed and that applicant conduct a new study of salvage values and submit the results to the Commission. Appli-

cant has conducted a complete review of its depreciation accrual rates and has submitted such a study (App. Ex. 4 and 4B). Although the matter is not discussed in the stipulation and recommendation, there is no evidence in the record contravening that study. While the study recommends increased depreciation accrual rates, such an increase will have no effect on the rate relief here requested, since applicant has agreed to accept a specified increase in rates in each of these cases. The Commission, therefore, is of the opinion, and so finds, that applicant's proposed depreciation accrual rates should be approved and should be continued in effect until otherwise ordered by the Commission.

FINDINGS OF FACT (Case No. 74-581-GA-AIR):

From the evidence of record in this case, the Commission finds:

(1) The motion for severance of this case from Case No. 75-205-GA-AIR for purposes of decision is well made and should be granted.

(2) The value of applicant's property used and useful for the rendition of gas service to the public affected by this application as of the date certain of June 30, 1974, is not less than $101,101,000.

(3) For the twelve month period ending December 31, 1974, the test year in this proceeding, the allocated revenues, expenses, and income available for fixed charges realized by applicant under its existing rate schedules are $57,899,000, $55,075,000, and $2,824,000, respectively.

(4) This net annual compensation of $2,824,000 represents a 2.79 percent rate of return on the rate base of $101,101,000.



(5) A 2.79 percent rate of return is insufficient to provide applicant reasonable compensation for the gas service it renders to its customers affected by this application.

(6) Applicant, the Commission's staff, and intervenor Armco have recommended a reduction in applicant's proposed rates, which, after such reduction, would result in a 5.53 percent rate of return on the rate base in this proceeding.

(7) A rate of return of 5.53 percent is fair and reasonable under the circumstances of this case and is sufficient to provide applicant just compensation and return on the value of its property used and useful in furnishing the service described in the application.

(8) A rate of return of 5.53 percent applied to the rate base of $101,101,000 will result in an allowable dollar return in the amount of $5,588,000.

(9) The allowable annual expenses of applicant for purposes of this proceeding are $57,838,000.

(10) The allowable gross annual revenue to which applicant is entitled for the purposes of this proceeding is the sum of the amounts set forth in Findings 8 and 9, or $63,426,000.

(11) An earnings erosion adjustment, also recommended by the aforesaid parties, of 0.9 cents per hundred cubic feet or 9 cents per thousand cubic feet of gas sold, to be applied to each step of the rates in order to take into account the decline in available gas supplies, is necessary so that applicant may be permitted an opportunity to earn the authorized return.

(12) A recommendation by the same parties for uniformity between the rates affected by this case and those affected by Case No. 75-641-GA-AIR is reasonable and should be approved.

(13) Applicant's proposal to conform its Service Regulations to those accepted by the Commission in applicant's most recent electric rate case, Case No. 72-415-Y, is reasonable and should be approved.

(14) The recommendation of these parties regarding the minimum bill provision of proposed Rate Sheet F-C (O.S. No. 30) is reasonable and should be approved.

(15) Applicant's proposed purchased gas adjustment clause, as modified by the recommendation of these parties, is reasonable and should be approved.

(16) Applicant's request with respect to depreciation accrual rates is supported by the record and applicant should institute such rates and continue them in effect until otherwise ordered by the Commission.

(17) The Stipulation and Recommendation of applicant, the Commission's Staff, and Armco, entered into on July 14, 1976, and identified as Joint Exhibit 1, is reasonable and should be approved, as indicated by the preceding Findings.

(18) Applicant's present tariffs affected by this application should be withdrawn and cancelled.

(19) Applicant should submit new tariffs consistent with the findings and discussion above.

CONCLUSIONS OF LAW (Case No. 74-581-GA-AIR):

(1) The application herein is filed pursuant to, and this Commission has jurisdiction thereof under the provisions of Sections 4909.17, 4909.18, and 4909.19 Revised Code; further, applicant has complied with the requirements of the aforesaid sections.



(2) The staff investigation has been conducted and a report duly filed and served and a public hearing has been held herein, the written notice thereof having complied with the requirements of Section 4909.19 Revised Code.

(3) The existing rates and charges now being charged and collected by the applicant for its gas service affected by this application are insufficient to provide applicant adequate net compensation and return on its property used and useful for the furnishing of such gas service to the affected customers.

(4) A rate of return of 5.53 percent is fair and reasonable under the circumstances presented by this case and is sufficient to provide applicant just compensation and return on its property used and useful for the furnishing of such gas service to the affected customers.

(5) Applicant should be authorized to cancel and withdraw its presently effective tariffs affected by this application and to file tariffs consistent with the Commission's discussion and findings set forth above.

FINDINGS OF FACT (Case No. 75-641-GA-AIR):

From the evidence of record in this case, the Commission finds:

(1) The motion for severence of this case from Case No. 75-205-GA-AIR for purposes of decision is well made and should be granted.

(2) The value of applicant's property used and useful for the rendition of gas service to the public affected by this application as of the date certain of June 30, 1974, is not less than $74,506,000.

(3) For the twelve month period ending December 31, 1974, the test year in this proceeding, the allocated revenues, expenses, and income available for fixed charges realized by applicant under its existing rate schedules are $35,015,000, $33,094,000, and $1,921,000, respectively.

(4) This net annual compensation of $1,921,000 represents a 2.58 percent rate of return on the rate base of $74,506,000.

(5) A 2.58 percent rate of return is insufficient to provide applicant reasonable compensation for the gas service it renders to its customers affected by this application.

(6) Applicant, the Commission's staff, and intervenor Armco have recommended a reduction in applicant's proposed rates, which, after such reduction, would result in a 6.82 percent rate of return on the rate base in this proceeding.

(7) A rate of return of 6.82 percent is fair and reasonable under the circumstances of this case and is sufficient to provide applicant just compensation and return on the value of its property used and useful in furnishing the service described in the application.

(8) A rate of return of 6.82 percent applied to the rate base of $74,506,000 will result in an allowable dollar return in the amount of $5,081,000.

(9) The allowable annual expenses of applicant for purposes of this proceeding are $36,261,000.

(10) The allowable gross annual revenue to which applicant is entitled for the purposes of this proceeding is the sum of the amounts set forth in Findings 8 and 9, or $41,342,000.

(11) An earnings erosion adjustment, also recommended by the aforesaid parties, of 0.9 cents per hundred cubic feet or 9 cents per thousand cubic feet of gas sold, to be applied to each step of the rates in order to take into account the decline in available gas supplies, is necessary so that applicant may be permitted an opportunity to earn the authorized return.



(12) A recommendation by the same parties for uniformity between the rates affected by this case and those affected by Case No. 74-581-GA-AIR is reasonable under the circumstances of these cases and should be approved.

(13) Applicant's proposal to conform its Service Regulations to those accepted by the Commission in applicant's most recent electric rate case, Case No. 72-415-Y, is reasonable and should be approved.

(14) Applicant's proposed purchased gas adjustment clause, as modified by the recommendation of these parties, is reasonable and should be approved.

(15) Applicant's request with respect to depreciation accrual rates is supported by the record and applicant should institute such rates and continue them in effect until otherwise ordered by the Commission.

(16) The Stipulation and Recommendation of Applicant, the Commission's staff, and Armco, entered into on July 14, 1976 and identified as Joint Exhibit 1, is reasonable and should be approved, as indicated by the preceding Findings.

(17) Applicant's present tariffs affected by this application should be withdrawn and cancelled.

(18) Applicant should submit new tariffs consistent with the findings and discussion above.

CONCLUSION OF LAW (Case No. 75-641-GA-AIR):

(1) The application herein is filed pursuant to, and this Commission has jurisdiction thereof under the provisions of Sections 4909.17, 4909.18, and 4909.19 Revised Code; further, applicant has complied with the requirements of the aforesaid sections.

(2) The staff investigation has been conducted and a report duly filed and served and a public hearing has been held herein, the written notice thereof having complied with the requirements of Section 4909.19 Revised Code.

(3) The existing rates and charges now being charged and collected by the applicant for its gas service affected by this application are insufficient to provide applicant adequate net compensation and return on its property used and useful for the furnishing of such gas service to the affected customers.

(4) A rate of return of 6.82 percent is fair and reasonable under the circumstances presented by this case and is sufficient to provide applicant just compensation and return on its property used and useful for the furnishing of such gas service to the affected customers.

(5) Applicant should be authorized to cancel and withdraw its presently effective tariffs affected by this application and to file tariffs consistent with the Commission's discussion and findings set forth above.

ORDER:

It is, therefore,

ORDERED, That applicant be, and hereby is, authorized to file tariff schedule sheets consistent with the findings and discussion set forth above and to cancel and withdraw its present tariffs. It is, further,



ORDERED, That the tariff sheets authorized herein shall be submitted for approval by the Commission. Upon receipt of two (2) copies of said tariffs conforming to this Opinion and Order the Commission will review and approve same by entry. It is, further,

ORDERED, That the effective date of the new tariff shall be thirty (30) days following Commission approval of such tariffs. The new rates included therein shall be applicable for all service rendered on or after such effective date. Applicant shall submit a proposed notice of the increase in rates and charges authorized herein to the Commission at such time as it files its tariffs for approval. The Commission will review and if proper approve same by entry. Upon the approval of such notice, applicant shall immediately commence notification of each of its customers, by insert or attachment, included within its billings. It is, further,

ORDERED, That applicant institute the depreciation accrual rates approved herein and continue them in effect until otherwise ordered by this Commission. It is, further,

ORDERED, That all objections and motions not specificially discussed within this Opinion and Order or rendered moot thereby, be, and hereby are, overruled and denied. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES
COMMISSION OF OHIO

/s/ C. Luther Heckman

Chairman

/s/ Sally W. Bloomfield

Entered in the Journal _____
Commissioners

A true copy: JUL 23 1976

/s/ Randall G. Applegate
Randall G. Applegate
Secretary

Late filed dissent will follow
/s/ David Sweet

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## APPENDIX E

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

| | |
|---|---|
| In the Matter of the Application of The Cincinnati Gas & Electric Company for an increase in its gas rates in the City of Cincinnati | Case No. 75-205-GA-AIR |

### OPINION AND ORDER

The Commission, coming now to consider the above-entitled application filed pursuant to Section 4909.18 Revised Code, the Secretary's Report of Investigation issued pursuant to Section 4909.19 Revised Code; having appointed its attorney examiners, Barth E. Royer and Helen L. Liebman, pursuant to Section 4901.18 Revised Code to conduct a public hearing and to certify the record directly to the Commission; the testimony and exhibits stipulation and recommendation entered into by applicant and the Commission's staff, and being otherwise fully advised in the premises and in compliance with Section 4903.09 Revised Code, hereby issues its Opinion and Order.

### HISTORY OF THE PROCEEDINGS:

The Cincinnati Gas & Electric Company, the applicant herein, is an Ohio corporation authorized to engage in the business of purchasing, distributing, and selling natural, synthetic, and liquified petroleum gas. As a public utility and natural gas company within the definitions of Sec-

tions 4905.02 and 4905.03 Revised Code, applicant is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06 Revised Code.

The instant application for a general increase in the rates to be charged for gas service to customers in the City of Cincinnati was filed March 25, 1975, pursuant to the provisions of Section 4909.18 Revised Code. The existing rates and charges to customers affected by the application were established by Ordinance No. 363-1972 of the City of Cincinnati which was terminated on July 15, 1974. By its application, the company originally sought an increase in rates which would produce approximately $10 million in additional gross annual revenue over that realized under the prior ordinance contract.

At the time this application was filed, the company also had pending before the Commission a general rate application covering its unincorporated service territory and sales to certain customers located within municipalities but not subject to previously existing ordinances (Case No. 74-581-GA-AIR). Subsequent to the filing of the instant case, applicant filed a third application seeking authority to increase rates in sixty-three named municipalities wherein rates for gas service had previously been established by ordinance contracts (Case No. 75-641-GA-AIR).

By entry of November 20, 1975, the Commission accepted the application for filing and granted all branches of the motion accompanying the application thereby establishing the twelve months ended December 31, 1974, as the test period for the analysis of accounts and June 30, 1974, as the date certain for the valuation of applicant's used and useful property. The form of legal notice proposed was approved for publication.

On April 8, 1975, the City of Cincinnati filed a petition for leave to intervene. The Commission granted intervention by entry of June 9, 1976.



The Commission staff, pursuant to the requirements of Section 4909.19 Revised Code, conducted an investigation of the matters contained in the application and the Secretary of the Commission issued a written report of the results of that investigation on May 28, 1976. Copies of the Secretary's Report were mailed to all appropriate parties. This report was issued in conjunction with the Secretary's Report in Case No. 75-641-GA-AIR and incorporated by reference the report issued February 27, 1976, in Case No. 74-581-GA-AIR. Objections were timely filed by the applicant and the City of Cincinnati.

On June 4, 1976, applicant filed a motion with the Commission seeking authority to include in its proposed gas rates an adjustment of 0.9¢ per 100 cubic feet to compensate for the erosion in earnings which it alleged would result principally due to changes in available gas supply subsequent to the test period. Applicant had previously filed a similar motion in Case No. 74-581-GA-AIR. By entry of June 9, 1976, the Commission approved for publication a legal notice advising the public of the proposal contained in this motion. The Commission further ordered that the three pending cases be consolidated for purposes of public hearing.

In accordance with terms of the Commission's prior entries, the public hearing of this matter commenced on July 12, 1976, at City Council Chambers in the City of Cincinnati before attorney examiner Barth E. Royer. The hearing thereafter was reconvened at the offices of the Commission in Columbus, Ohio, before attorney examiner Royer and attorney examiner Helen L. Liebman.

At hearing on July 14, 1976, applicant, the Commission staff and Armco Steel Corporation, intervenor in Case No. 75-581-GA-AIR, submitted a stipulation and joint recommendation with respect to Case No. 74-581-

GA-AIR and Case No. 75-641-GA-AIR whereby the parties stipulated certain prefiled testimony into evidence, waived cross-examination, and recommended as reasonable rate increases lesser in amount than those originally proposed in the respective applications. Because the City of Cincinnati, a party to Case No. 75-205-GA-AIR, declined to join in a similar stipulation and recommendation in that case, the parties to the stipulation and recommendation moved that Case No. 74-581-GA-AIR and Case No. 75-641-GA-AIR be severed from Case No. 75-205-GA-AIR for purposes of decision. The Commission, by its order of July 23, 1976, determined that Case No. 74-581-GA-AIR and Case No. 75-641-GA-AIR were ripe for decision and should be severed and, upon review of the record, authorized rate increases in the two cases in the recommended amounts.

The public hearing in Case No. 75-205-GA-AIR continued until conclusion on July 22, 1976.

APPEARANCES:

Messrs. Squire, Sanders & Dempsey, Messrs. Alan P. Buchmann, William C. Donahue, and Philip S. Schaefer, 1800 Union Commerce Building, Cleveland, Ohio, and Mr. William J. Moran, General Counsel, and Mr. James J. Mayer, 139 East Fourth Street, Cincinnati, Ohio, on behalf of The Cincinnati Gas & Electric Company.

Mr. William J. Brown, Attorney General of Ohio, by Messrs. John W. Bentine and Samuel C. Randazzo, Assistant Attorneys General, 111 North High Street, Columbus, Ohio, on behalf of the staff of the Public Utilities Commission of Ohio.

Messrs. Goldberg, Fieldman & Hjelmfelt, by Mr. Reuben Goldberg, 1700 Pennsylvania Avenue, N.W. Washington, D.C., and Mr. Thomas A. Luebbers, City Solicitor, and



Mr. W. Peter Heile, Assistant City Solicitor, 214 City Hall, Cincinnati, Ohio, on behalf of the City of Cincinnati.

COMMISSION REVIEW AND DISCUSSION:

This case comes before the Commission upon the application of The Cincinnati Gas and Electric Company filed pursuant to Section 4909.18 Revised Code for authority to increase its rates and charges for gas service to its general service customers located within the City of Cincinnati. As indicated above, the instant case was originally consolidated for purposes of public hearing with Case No. 74-581-GA-AIR and Case No. 75-641-GA-AIR. The three cases, taken together, embrace all of applicant's retail service. By its order of July 23, 1976, the Commission found just and reasonable a stipulation and joint recommendation entered into by the parties in the above two proceedings (Joint Ex. 1), and approved rates in those cases, which, on an overall basis, would yield applicant 92% of its requested increases. Applicant and the Commission staff entered into a similar stipulation and joint recommendation in the instant case (Joint Ex. 2), which, if accepted, would result in uniform rates for all of applicant's gas customers and, with respect to the customers affected by this proceeding, lower rates than those originally proposed by applicant. The City of Cincinnati, intervenor herein, declined to join in that stipulation and joint recommendation and, accordingly, was afforded the opportunity to develop a full and complete record with respect to matters placed in issue by its objections to the Secretary's Report. The Commission findings in Case No. 74-581-GA-AIR and Case No. 75-641-GA-AIR are in no way binding on the Commission for purposes of this case which must be decided on its own record.

It should be noted at the outset, however, that the stipulation and joint recommendation sponsored by ap-

plicant and the staff in this proceeding (Joint Ex. 2) proposes an increase in rates which would result in a rate of return recommended as reasonable by the staff witness on that subject and well below the range supported by the testimony of applicant's financial witness, even when based on rate base, revenue, and expense determinations which disregard applicant's filed objections and are, therefore, most adverse to the company's position. In light of this fact, the Commission is of the opinion that it is in the best interests of the customers affected by this proceeding that the increase stipulated to by applicant and recommended by the staff be given careful consideration despite the objections of the City of Cincinnati.

## RATE BASE

The applicant and the Commission's staff each submitted an estimate of the value of applicant's property used and useful in the rendition of gas service to customers affected by this application as of June 30, 1974, the date certain in this proceeding. Intervenor presented no such valuation. The respective recommendations of the applicant and the staff are set forth on the following table:

| | Applicant | Staff |
|---|---|---|
| Reproduction Cost New | $150,365,000 | $149,975,000 |
| Less Depreciation | 46,255,000 | 48,019,000 |
| Reproduction Cost New Less Depreciation | $104,110,000 | $101,956,000 |
| Working Capital Allowance | 4,466,000 | - - - |
| Rate Base | $108,576,000 | $101,956,000 |

As is evident from this summary, the principal differences in the rate base estimates proposed by applicant and the staff relate to depreciation and the allowance for working capital. These discrepancies need not be resolved



however, for in testing the reasonableness of the stipulated increase it is proper to assume the least favorable case for the applicant. Thus, the Commission is of the opinion and so finds, that it is appropriate to adopt the staff's valuation as its rate base determination for purposes of this proceeding.

Although the City of Cincinnati's filed objections questioned a number of elements in the area of rate base determination, only two matters were pursued at hearing and addressed on brief: (1) inclusion of the Hartwell Recreation Center in the rate base and (2) the level of the working capital allowance claimed by applicant. Adoption of the staff's rate base valuation renders these issues moot as the staff estimate excluded the Hartwell Center and contains no allowance for working capital. Thus, the Commission finds that the value of applicant's property used and useful in the rendition of gas service to customers affected by this case to be not less than $101,956,000.

## REVENUES AND EXPENSES

Both the applicant and the staff submitted analyses of test year accounts depicting the results of operations under applicant's present and proposed rates. Applicant's calculation of the allocated revenues derived and expenses incurred in rendering natural gas service to customers affected by this case under present rates may be summarized as follows:

| | | |
|---|---|---|
| Operating Revenues | | $50,087,000 |
| Operating Expenses | $46,236,000 | |
| FIT | 952,000 | |
| Total Operating Deductions | | 47,188,000 |
| Income Available for Fixed Charges | | $ 2,899,000 |

Under the rates proposed in the application, applicant submits that its annual revenues and expenses would be as follows:

| | | |
|---|---|---|
| Operating Revenues | | $59,736,000 |
| Operating Expenses | $46,541,000 | |
| FIT | 5,437,000 | |
| Total Operating Deductions | | 51,878,000 |
| Income Available for Fixed Charges | | $ 7,758,000 |

As a result of its investigation, the staff determined applicant's allocated test year revenues and expenses to be as follows:

| | | |
|---|---|---|
| Operating Revenues | | $51,771,000 |
| Operating Expenses | $47,225,000 | |
| FIT | 1,214,000 | |
| Total Operating Deductions | | 48,439,000 |
| Income Available for Fixed Charges | | $ 3,332,000 |

The staff audit produced the following findings of revenues and expenses under the proposed rates:

| | | |
|---|---|---|
| Operating Revenues | | $61,744,000 |
| Operating Expenses | $47,532,000 | |
| FIT | 5,854,000 | |
| Total Operating Deductions | | 53,385,000 |
| Income Available for Fixed Charges | | $ 8,358,000 |

The discrepancies between the applicant's and the staff's determination of revenues and expenses may be ascribed to a number of minor differences, many of which are the subject of applicant's filed objections. As with respect to rate base, the Commission deems it appropriate under the circumstances of this case to adopt its staff's analysis of accounts for purposes of examining the reasonableness of the tendered stipulation and joint recommendation on the grounds that its ultimate conclusion is



least favorable to applicant's position. However, this does not end the matter. As noted, applicant, in the interest of expediting this proceeding, has stipulated its willingness to accept a gross annual revenue increase of $9,053,000 (Joint Ex. 2). This is the amount which, when considered in conjunction with the rate relief authorized in Case No. 74-581-GA-AIR and Case No. 75-641-GA-AIR, would produce 92% of the total increase originally requested in the three cases. Adjusting the staff's accounting analysis to reflect this stipulated increase results in income available for fixed charges of $7,891,000 based on test year operations.

The City of Cincinnati calls into question four items in the area of the determination of applicant's allowable expenses. First, intervenor contends that charitable contributions should be excluded in calculating cost of service. The Commission has had occasion to discuss this issue in a succession of opinions beginning with *Cleveland Electric Illuminating Company*, Case No. 71-634-Y (1973) and ending with its recent order in *Ohio Bell Telephone Company*, Case No. 74-761-TP-AIR (1976), and has allowed reasonable contributions which are of benefit to the communities in which they are made. This is a question of policy and the Commission is guided in its determination by the legislative directive contained in House Concurrent Resolution No. 24 of the 110th General Assembly which advised the Commission that charitable contributions should be allowed as an expense in determing utility rates. Next, the City of Cincinnati objects to the inclusion of wage increases which became effective beyond the test year. Again, this Commission, beginning with its orders in *East Ohio Gas Company*, Case No. 72-378-Y (1974) and *United Telephone Company of Ohio*, Case No. 72-905-Y (1974), has consistently authorized an ad-

justment to expenses to recognize the impact of significant wage increases which become effective subsequent to the test period. To ignore such increases would have the effect of precluding an applicant utility from realizing the return authorized by the Commission as of the very date the order is issued. Although the Commission would prefer to make such adjustments unnecessary by the use of a more current test year, under present circumstances there is no justification for departing from our normal practice. The City of Cincinnati also objects to the depreciation accrual rates proposed by applicant. This question is rendered moot for purposes of determining cost of service for this proceeding by the adoption of the staff's accounting analysis. Finally, the City of Cincinnati objects to the allowance for Federal Income Tax on the grounds that applicant's effective tax rate is actually less than the 48% rate used by both the staff and applicant for purposes of revenue and expense computation. Intervenor alleges that this results from the fact that the company files a consolidated tax return thereby benefiting from losses incurred by one of its subsidiaries, Tri-State Improvement Corporation, and that this "advantage" should be passed on to ratepayers. The record shows, however, that this theory, even if it had merit, is based on a mistake of fact, for the extent to which the company's effective tax rate is below the regular 48% rate is due primarily to the benefits of liberalized depreciation (R. Vol. IV, p. 45). In accordance with the Commission's recent decision in *Ohio Bell Telephone Company, supra,* on this subject, the Commission is of the opinion that the staff's computed Federal Income Tax allowance is proper.



## RATE OF RETURN

Applying the dollar return under present rates of $3,332,000 to the rate base of $101,956,000, as determined above, yields a rate of return of 3.27%. Such a rate of return is obviously insufficient to provide applicant with reasonable compensation for the gas service it renders to customers affected by this application.

Under the rates originally proposed by applicant, a rate of return of 8.20% would have been generated based upon test year operations. Applicant's witness Melnyk, using a methodology familiar to this Commission, recommended as fair and reasonable a rate of return in the range of 8.8% to 10.2% (App. Ex. 10). The testimony of staff witness Loconto, filed in conjunction with the Secretary's Report in Case No. 74-581-GA-AIR, suggests a considerably wider range, with the specific rate of return recommended to be dependent on interpretation of Ohio law. The Commission notes that the staff testimony was filed prior to recent decision of the Supreme Court of Ohio in *General Telephone Company v. Public Utilities Commission,* 46 Ohio St.2d 281 (1976). The indicated rate of return, should the total requested relief be granted, falls well within the limits of Mr. Loconto's findings when applied in accordance with that decision. Mr. Loconto so testified at hearing. The Commission further notes that the lower limit of witness Melnyk's recommendation is based on the use of the current embedded cost of debt. Had the current embedded cost of preferred stock also been employed this lower limit would have been higher.

Despite this evidence, the fact remains that applicant has expressly agreed to accept an increase in gross annual revenues of $9,053,000 (Joint Ex. 2). This stipulated increase would produce a rate of return of 7.74% on the rate base approved for purposes of this proceeding. Under the circumstances of this case, the Commission is of the

opinion that the stipulation and joint recommendation should be accepted and that a rate of return of 7.74% should be approved as just and reasonable for purposes of this proceeding.

## UNIFORM RATES

As previously noted, acceptance of the stipulation and joint recommendation will result in uniform rates throughout applicant's service territory. The City of Cincinnati objects to the establishment of uniform rates, contending that subjecting general service customers in the City of Cincinnati to the same rates approved for customers affected by Case No. 74-581-GA-AIR and Case No. 75-641-GA-AIR creates an undue burden on the Cincinnati customers. Although it is true that acceptance of the uniform rate proposal under the circumstances presented by these three cases results in a higher indicated rate of return in the City of Cincinnati case, further analysis clearly demonstrates the propriety of the uniform rates for all gas customers of the company.

The record in the instant case considered of itself, fully supports as just and reasonable an annual increase in authorized gross revenues in the stipulated amount. This, in a real sense, moots intervenor's objection, for there is no requirement that authorized rates of return be uniform throughout a utility's service area. *Columbus v. Columbus and Southern Ohio Electric Company*, 171 Ohio St. 38 (1960) and *General Telephone Company, supra.* Customers in the City of Cincinnati are being asked to pay only what has been found just and reasonable as to them. As discussed in the Commission's order in the companion cases, the reason that rates have not been uniform throughout applicant's service territory in the past is attributable to the number of municipalities located therein, each



with primary ratemaking jurisdiction, and not to any significant differences in cost of service. As a practical matter, the physical operations of this company are carried on without regard to political boundaries, and, in the absence of effective ordinances, the Commission can see no reason why corporation limits should be viewed as the appropriate basis for segregating customers for different rate treatment. After all, had these three cases been filed as a single application, involving a single rate base and a single revenue requirement, what basis would exist for establishing different rates for two general service customers, one located within a municipality and the other located next door, but outside the corporation limits? Further, the company's customers are all part of what is, essentially, the same economic community. *Columbus and Southern Ohio Electric Company*, Case Nos. 72-903-Y, 73-841-Y (1974). The staff has recommended uniform rates as desirable and the Commission finds that uniform rates are, in all respects, reasonable and proper.

## CURTAILMENT ADJUSTMENT

Applicant proposes an adjustment in the amount of 0.9¢ per hundred cubic feet or 9¢ per thousand cubic feet to take into account the decline in available gas supplies. In effect, without this adjustment, applicant would earn, on an overall basis, somewhat less than the rates of return heretofore approved in this case and the companion cases assuming that the decreased 1975 sales volumes were experienced in the test year (R. Vol. IV pp. 5-6). The decreased sales volumes are fact and the evidence shows that there is no expectation of restored volumes in the foreseeable future when the rates approved by this Order will be in effect. Ratemaking is prospective and to approve a rate of return based upon 1974 data, when the

record shows that that data will be inapplicable in the future, would mean that applicant could under no circumstances realize the rate of return found just and reasonable. The Secretary's Report recognizes this problem (Schedule 19) and the staff has joined in applicant's recommendation. The City of Cincinnati opposes it.

The evidence shows that the decreased availability of gas has resulted in substantial curtailment of applicant's special contracts customers. It is apparently intervenor's position that because the special contract rates have historically been set, not by ordinance, but in applicant's "jurisdictional" proceedings, (e.g. Case No. 74-581-GA-AIR), the burden of the loss in revenues resulting from that curtailment should fall only on "jurisdictional" customers. This argument lacks support in logic or on the record. Applicant's ability to interrupt its special customers is of benefit to *all* its firm customers, without regard to the chances of municipal boundaries. Specifically, the customers involved in this case receive precisely the same benefits as do the firm customers in applicant's other rate areas (R. Vol. IV, pp. 46-47). There is no evidence which would support the conclusion that the full impact of this erosion in gas supply should be borne only by customers outside Cincinnati, merely because the City of Cincinnati has heretofore not included special contract customers in its ordinances. Other objections to the adjustment voiced by intervenor's witness Ruppe are similarly lacking in merit and totally without support in the record. The Commission finds applicant's proposal to be reasonable and authorizes applicant to add to each step of the rates 0.9¢ per hundred cubic feet or 9¢ per thousand cubic feet to compensate for this form of erosion. The Commission has previously authorized a similar adjustment with respect to Dayton Power and Light Company [Case No. 73-166-Y (August 19, 1975)]. Such an adjustment is to be distinguished from the earnings erosion adjustment rejected by the Commission in *East Ohio Gas Company*, 74-826-GA-AIR (August 25, 1976), which was largely determined by measuring the actual historical decline in return on net plant caused by all sources of erosion to operating income and was thus inconsistent with the test year requirement. The curtailment adjustment proposed here constitutes a proper adjustment to applicant's test year revenues which are demonstrably unrepresentative due to the permanent decline in available gas supplies.



## ADDITIONAL CONSIDERATIONS

A number of miscellaneous matters merit notice. Applicant has proposed to conform its Service Regulations to those accepted by this Commisson in applicant's most recent electric rate case, Case No. 72-145-Y. Although not covered in the stipulation and recommendation the Commission is aware of no objections to this proposal and has already approved this revision in the companion cases. Thus, the Commission finds that the regulations should be conformed in this proceeding as well.

Applicant originally proposed certain adjustments to its purchased gas adjustment clause. The staff concurred with applicant's proposal except to the extent it would include excise taxes, suggesting that the latter question be deferred until a uniform purchased gas adjustment clause policy can be adopted (R. Vol. IV, p. 127). Applicant, in the stipulation and recommendation in Case Nos. 74-581-GA-AIR and 76-641-GA-AIR (Jt. Ex. 1), withdrew its proposal with respect to excise taxes and did so on the record in this case. There is, therefore, no matter in controversy with respect to this issue and the Commission believes, and so finds, that applicant's proposed purchased gas adjustment clause, as so modified, should be approved.

The Secretary's Report contains a staff recommendation that applicant's depreciation accrual rates be reviewed and that applicant conduct a new study of salvage values and submit the results to the Commission. Applicant has conducted a complete review of its depreciation accrual rates (App. Ex. 4-4B). As indicated above, the City of Cincinnati objects to the accrual rates proposed by applicant. However, in view of the acceptance of the stipulation and joint recommendation in this proceeding, the increase in accrual rates proposed has no effect on the revenues authorized in this proceeding. Further, the Commission finds the study submitted to support the proposed revisions and orders applicant to institute such rates and to continue them in effect until otherwise ordered by the Commission.

FINDINGS OF FACT:

From the evidence of record in this proceeding, the Commission now finds:

1) The value of applicant's property used and useful for the service and convenience of the public affected by this application as of the date certain, June 30, 1974, is not less than $101,956,000.

2) For the twelve-month period ending December 31, 1974, the test year in this proceeding, the allocated revenues, expenses, and income available for fixed charges realized by applicant under its existing rate schedules were $51,771,000, $48,-439,000 and $3,332,000, respectively.

3) This net annual compensation of $3,332,000 represents a 3.27 percent rate of return on the rate base of $101,956,000.

4) A 3.27 percent rate of return is insufficient to provide applicant reasonable compensation for



the gas service it renders to its customers affected by this application.

5) A rate of return of 7.74 percent is fair and reasonable under the circumstances of this case and is sufficient to provide applicant just compensation and return on

6) A rate of return of 7.74 percent applied to the rate base of $101,956,000 will result in an allowable dollar return in the amount of $7,891,000.

7) The allowable annual expenses of applicant for purposes of this proceeding are $52,933,000.

8) The allowable gross annual revenue to which applicant is entitled for the purposes of this proceeding is the sum of the amounts set forth in Findings 6 and 7, or $60,824,000.

9) An earnings curtailment adjustment of 0.9¢ per hundred cubic feet or 9¢ per thousand cubic feet of gas sold, to be applied to each step of the rates in order to take into account the decline in available gas supplies, is necessary so that applicant may be permitted an opportunity to earn the authorized return.

10) Applicant's proposal to conform its Service Regulations to those accepted by the Commission in applicant's most recent electric rate case, Case No. 72-415-Y, is reasonable and should be approved.

11) Applicant's proposed purchased gas adjustment clause, as modified, is reasonable and should be approved.

12) Applicant's request with respect to depreciation accrual rates is supported by the record and applicant should institute such rates and continue them in effect until otherwise ordered by the Commission.

13) Applicant's present tariffs governing service to customers affected by this application should be withdrawn and cancelled.

14) Applicant should submit new tariffs consistent with the discussion and findings above.

CONCLUSIONS OF LAW:

1) The application herein is filed pursuant to, and this Commission has jurisdiction thereof under the provisions of Sections 4909.17, 4909.18, and 4909.19, Revised Code, further, applicant has complied with the requirements of the aforesaid sections.

2) The staff investigation has been conducted and a report duly filed and served and a public hearing has been held herein, the written notice thereof having complied with the requirements of Section 4909.19, Revised Code.

3) The existing rates and charges now being charged and collected by applicant for gas service to customers affected by this application are insufficient to provide applicant adequate net annual compensation and return on its property used and useful in furnishing such service.

4) A rate of return of 7.74 percent is fair and reasonable under the circumstances of this case and is sufficient to provide applicant just compensation and return on its property used and useful in furnishing gas service to the affected customers.

5) Applicant should be authorized to cancel and withdraw its presently effective tariffs affected by this application and to file tariffs consistent with the Commission's discussion and findings set forth above.



ORDER:

It is, therefore,

ORDERED, That applicant be, and hereby is, authorized to file tariffs consistent with the discussion and findings set forth above and to cancel and withdraw its present tariffs governing service to customers affected by this application. It is, further,

ORDERED, That the tariff sheets authorized herein shall be submitted for approval by the Commission. Upon receipt of two (2) copies of said tariffs conforming to this Opinion and Order the Commission will review and approve same by entry. It is, further,

ORDERED, That the effective date of the new tariffs shall be thirty (30) days following Commission approval of such tariffs. The new rates included therein shall be applicable for all service rendered on or after such effective date. Applicant shall submit a proposed notice of the increase in rates and charges authorized herein to the Commission at such time as it files its tariffs for approval. The Commission will review and, if proper, approve same by entry. Upon the approval of such notice, applicant shall immediately commence notification of each of its customers, by insert or attachment, included within its billings. It is, further,

ORDERED, That applicant institute the depreciation accrual rates approved herein and continue them in effect until otherwise ordered by this Commission. It is, further,

ORDERED, That all objections and motions not specifically discussed within this Opinion and Order or rendered moot thereby, be, and hereby are, overruled and denied. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES
COMMISSION OF OHIO

/s/ C. Luther Heckman

/s/ Sally W. Bloomfield

/s/ David Sweet

Commissioners

Entered in the Journal
SEP 8 1976

A True Copy

/s/ Randall G. Applegate

Randall G. Applegate
Secretary



## APPENDIX F

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

| | |
|---|---|
| In the Matter of the Application of The Cincinnati Gas & Electric Company for an increase in its gas rates under the direct jurisdiction of the Public Utilities Commission of Ohio. | Case No. 74-581-GA-AIR |
| In the Matter of the Application of The Cincinnati Gas & Electric Company for an increase in its gas rates in the Sixty-Three Municipalities set forth in the Application. | Case No. 75-641-GA-AIR |

### REHEARING ENTRY

The Commission, coming now to consider the above-entitled matter and, specifically, its Opinion and Order in these dockets issued July 23, 1976, the Application for Rehearing filed by the City of Cincinnati on August 20, 1976, the Memorandum in Opposition thereto filed by the Cincinnati Gas & Electric Company on September 14, 1976, and being otherwise fully advised in the premises, hereby makes the following findings:

1) On July 23, 1976, the Commission issued its Opinion and Order in the above-captioned cases

authorizing the Cincinnati Gas & Electric Company to file tariffs implementing a general increase in gas rates to customers affected thereby. These cases were originally consolidated for purposes of public hearing with Case No. 75-205-GA-AIR, an application by Cincinnati Gas & Electric Company for authority to increase gas rates to customers in the City of Cincinnati. During the course of the public hearings, all parties to Case No. 74-584-GA-AIR and Case No. 75-641-GA-AIR entered into a stipulation jointly recommending to the Commission that the Cincinnati Gas & Electric Company be granted a specific increase in gross annual revenue less than that originally sought through these applications and moving that these cases, being ripe for decision, be severed from Case No. 75-205-GA-AIR. By its July 23 order, the Commission granted the motion to sever, and, upon review of the record, authorized a rate increase in the recommended amount.

2) The public hearing in Case No. 75-205-GA-AIR continued until conclusion and on September 8, 1976, the Commission, based on the record in that case, issued its Order authorizing an increase in gas rates to customers in the City of Cincinnati. The relief granted was in the amount recommended by all parties to the proceeding except the City of Cincinnati, intervenor, and less than that originally proposed in the application. The increase authorized in the Cincinnati case resulted in uniform rates throughout the company's service territory.

3) On August 20, 1976, the City of Cincinnati filed an application for rehearing from the Commission's order in Case No. 74-581-GA-AIR and Case No. 75-641-GA-AIR pursuant to the provisions of Section 4903.10 Revised Code. In its rehearing



application the City of Cincinnati assigns as error a number of particulars which it alleges render the Commission's order unreasonable and unlawful. In summary, these assignments of error relate chiefly to the decision of the Commission to sever these cases from the Cincinnati case for decision and the acceptance by the Commission of the stipulation and joint recommendation of the parties thereto.

4) The Commission is of the opinion, and so finds, that the City of Cincinnati does not have standing to seek a rehearing in Case No. 74-581-GA-AIR and Case No. 75-641-GA-AIR as it was not a party to these proceedings nor were any of its rights affected by the decision therein.

5) The Commission, by entry of June 9, 1976, granted the City of Cincinnati leave to intervene in Case No. 75-205-GA-AIR. Although the Commission did consolidate the three cases for purposes of public hearing as a matter of administrative convenience, such consolidation did not serve to enlarge the scope of the City of Cincinnati's interest in these proceedings which is limited to the customers it represents within the corporate boundaries of the municipality and, thus, to Case No. 75-205-GA-AIR. The power to consolidate cases rests solely within the discretion of the Commission and there is no right to a continued consolidation.

6) The application for rehearing from the Commission order in Case No. 74-581-GA-AIR and Case No. 75-641-GA-AIR should be denied as no rights of the City of Cincinnati were affected thereby.

It is, therefore,

ORDERED, That the above findings be observed. It is, further,

ORDERED, That copies of this entry be served upon the City of Cincinnati and all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ C. Luther Heckman

/s/ Sally W. Bloomfield

/s/ David Sweet

Commissioners

Entered in the Journal
SEP 15 1976

A True Copy

/s/ Randall G. Applegate

Randall G. Applegate
Secretary



## APPENDIX G

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

| | |
|---|---|
| In the Matter of the Application of the Cincinnati Gas & Electric Company for an increase in its Gas Rates in the City of Cincinnati. | Case No. 75-205-GA-AIR |

ENTRY

The Commission, coming now to consider the above-entitled matter, and, specifically, the application for rehearing of certain matters determined by the Commission in its Opinion and Order issued September 8, 1976, filed by the City of Cincinnati, Ohio on October 6, 1976, and being otherwise fully advised in the premises, now makes the following findings:

1) The City of Cincinnati, Ohio (intervenor) timely filed pursuant to Section 4903.10 Revised Code an application for rehearing of certain matters determined in the Commission's Opinion and Order (Order) in this matter journalized September 8, 1976.

2) Intervenor's first, second and third assignments of error allege that the City of Cincinnati has been denied a fair hearing and due process of law in violation of its state and federal constitutional rights, by reason of the severance of Case Nos. 74-581-GA-AIR and 75-641-GA-AIR from this proceeding and the Commission's issuance of its decision in Cases 74-581-GA-AIR and 75-641-GA-AIR prior to the completion of public hearings in this matter. These assignments of error are with-

out merit and rehearing on these grounds should be denied. The Commission's Order specifically notes that the findings made in the other proceedings were not deemed to be binding for purposes of consideration of this case and express recognition is given to the requirement that issues arising in this case be decided upon consideration of facts contained within the record in this proceeding. A review of the Order clearly indicates that all controverted issues were so resolved. As a part of its assignments of error, intervenor makes specific reference to the question of uniform rates and suggests that the Commission's authorization of such rates in the services areas of Cases 74-581-GA-AIR and 75-641-GA-AIR was dispositive of the level of rates to be set in this proceeding. Clearly this assertion is without merit. The propriety of the rate schedules authorized herein is supported by the record and applicable law. Had the weight of the evidence in this proceeding indicated that the rates sought by Cincinnati Gas and Electric (applicant) were unreasonable when applied to the rate schedules which are the subject of the instant rate request, the Commission would have in no way been estopped or limited in its ability to vary the rates to be authorized from those established in the prior proceedings.

3) Intervenor's fourth, fifth, sixth and seventh allegations of error relate to three particulars in which it claims that the Commission improperly included as a part of applicant's cost of service expenses either incurred by the company or to be incurred as a result of the rate increase authorized. The record shows that intervenor's assignments of error relating to the inclusion of charitable contributions, an adjustment for wage and salary increases incurred subsequent to the end of the test



period, and the computation of applicant's test period income tax expenses are without merit and rehearing on these grounds should be denied. The rationale for the Commission's treatment of these matters is discussed in the Order and is, in all respects, both reasonable and consistent with past practice.

4) Intervenor asserts as its eighth assignment of error that the Commission erred in finding a 7.74 rate of return to be just and reasonable compensation for the utility service rendered in that such a rate of return is neither supported by substantial evidence nor law and is in excess of the rate of return proposed by the company in its rate filing. Upon a careful review of the record and the arguments made by intervenor in support of this assignment of error, the Commission finds that rehearing on this ground should be denied. The testimony of both Mr. Melnyk, applicant's cost of capital witness, and Mr. Loconto, testifying on behalf of the staff, when considered in their entirety, unequivocally support a finding that a 7.74 rate of return is not excessive and is within the range of reasonable rates of return to be authorized in this proceeding. The record offers no support for the proposition suggested by intervenor that a 7.74 percent rate of return is *per se* in excess of the appropriate range of reasonable rates of return merely because it is in excess of the ratio of the initially requested income available for fixed charges proposed by the company and applicant's estimated rate base valuation.

5) Intervenor asserts that the Commission erred in prescribing uniform rates throughout applicant's service territory in that such rates are unsupported by the evidence of record, require the customers of the City of Cincinnati to subsidize con-

sumers in other areas and unlawfully discriminate against gas consumers receiving service within the city. The Commission can not agree with intervenor's assertions. As is noted above, the record clearly demonstrates that the rates authorized for service rendered under the rate schedules sought to be increased by the instant application are both reasonable and lawful based upon an analysis of the evidence presented. Further, the evidence more than adequately supports an authorization of rates for service within the City of Cincinnati which are uniform with rates authorized for service rendered to other areas served by applicant. The legal propriety of such an authorization is also clearly established and is discussed in the Order.

6) Finally, intervenor assigns as error the Commission's authorization of a curtailment adjustment of nine cents per thousand cubic feet to reflect a decline in available gas supplies since the test period. Intervenor asserts such an adjustment is unsupported by the record, results in unlawful discrimination against customers receiving service in the City of Cincinnati, and requires such customers to subsidize applicant's other consumers. Once again, the propriety of the curtailment adjustment, under the facts presented in this case, is fully discussed by the Order. The adjustment is both supported by the record and consistent with Commission precedent. Rehearing on this ground should, therefore, be denied.

It is, therefore,

ORDERED, That the application for rehearing of certain matters determined in the Commission's Opinion and Order herein dated September 8, 1976, is denied for the reasons set forth in the above findings. It is, further,



ORDERED, That copies of this entry be served forthwith upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ C. Luther Heckman
Chairman

/s/ Sally W. Bloomfield

Commissioners

Entered in the Journal
NOV 2 1976

A True Copy

/s/ Randall G. Applegate
Randall G. Applegate
Secretary

## APPENDIX H

### UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

### OHIO REVISED CODE

The following sections of the Ohio Revised Code are from the 1953 bound volume. Each of the following sections was amended in 1976. The effective date of the amendments was September 1, 1976, and, therefore, the amended sections were not applicable to the three rate applications filed by CG&E.

Section 4909.18, page 101 of Ohio Revised Code (1953) (no volume number):

§4909.18 Application. (GC§614-20)

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds



upon which such application is based. If such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission shall permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect.

If said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A detailed inventory and appraisal of its property used and useful in rendering the service referred to in such application;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed.

Section 4909.19, pages 101-102 of Ohio Revised Code (1953) (no volume number):

§4909.19 Publication; investigation. (GC§614-20)

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish the substance and prayer of such application, in a form approved by the public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and affected by the matters referred to in said application, and the commission shall at once cause an investigation to be made of the facts set forth in said appli-

cation and the exhibits attached thereto, and of the matters connected therewith. Within fifteen days after the filing of such application, or within such additional time as the commission orders, a written report shall be made and filed with the commission, a copy of which shall be sent by registered mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The commission may grant continuances for a longer period than three days upon its order for good cause shown.



When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. The commission shall promptly fix a date for final hearing, giving notice thereof to all interested parties, at which hearing all interested parties shall be entitled to be heard in person or by counsel, and thereafter the commission shall make such order respecting the prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance with such general rules and regulations as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.

## RULES OF PRACTICE BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

### 1.04 PARTIES

Any person, firm, company, corporation or association, mercantile, agricultural or manufacturing society, body politic or municipal corporation, railroad or public utility

may become a party: (a) by filing an application, petition, or complaint; (b) by filing a protest within the time and manner provided by law or by rule or regulation of the Public Utilities Commission; (c) by entering an appearance, following leave granted to intervene, as hereinafter set forth in this Section, or (d) by entering an appearance at the hearing.

Where a complaint relates to the rates or practices of a single railroad or public utility, no other railroad or public utility need to be made a party, but if it relates to matters in which two or more railroads or public utilities are interested, the several railroads or public utilities are proper parties defendant.

Where a complaint relates to rates or practices of railroads operating different lines, and the object of the proceeding is to secure correction of such rates or practices on each of said lines, all the railroads operating such lines must be made defendants.

If a railroad or public utility is operated by a receiver or trustee, the receiver or trustee shall also be made a party defendant.

A petition in a proceeding for leave to intervene shall set forth the petitioner's interest in the proceeding. Leave granted on such application shall entitle intervenor to appear as a party to the proceeding, file an answer or other pleading, have notice of hearing, produce and cross-examine witnesses, and be heard in person or by counsel.

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## APPENDIX I

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

| | |
|---|---|
| In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Gas Rates in the City of Cincinnati. | Case No. 75-205-GA-AIR |
| In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in its Gas Rates in the Sixty-three Municipalities set forth in the Application. | Case No. 75-641-GA-AIR |

### ENTRY

The Commission, coming now to consider the above-entitled matters, and being fully advised in the premises, now makes the following findings:

1) The Commission caused investigations to be made of the facts set forth in the above styled applications, in the exhibits attached thereto, and of the matters connnected therewith.

2) Written reports of the staff's investigations into these matters was filed by the Secretary of the Commission on May 28, 1976.

3) Copies of the Staff Report of Investigation were mailed to the applicant, the clerks of the townships affected by the application, and such other persons as the Commission deemed interested.

4) Pursuant to Section 4909.19 Revised Code, objections to the Staff Report are to be filed with the Commission within thirty (30) days after the issuance of the aforesaid report.

5) Objections to the Staff's Report of Investigation are to be filed with the Commission on as before June 28, 1976.

6) While Section 1.04 of the Commission's Code of Rules and Regulations provides that one may become a party to this proceeding by appearing at hearing, those individuals who wish to intervene in this matter are encouraged to file a Petition to Intervene in advance of the date herein established for the filing of objections. It is anticipated that compliance with this recommendation will serve to facilitate an expeditious and full consideration of this matter.

7) On June 4, 1976, applicant filed in each of the instant applications a "Motion for an Adjustment in Rates to Compensate for Erosion in Earnings" which, if granted, would authorize applicant to add to each proposed rate base/steps 0.9¢ per 100 cubic feet to offset earnings erosion due to known changes in operations, gas supply, and expenses subsequent to the twelve months test period ended December 31, 1974.

8) The Commission is without sufficient evidence to judge the merits of applicant's requests for an earning erosion adjustment prior to the public hearing. The Commission will therefore defer ruling upon such motions until issuance of its Opinion and Order in these matters.

9) Concurrent with the filing of the above-noted motions, applicant filed in each of the instant applications a "Motion to Publish Notice of Applicant's Motion for an Adjustment in Rates to Compensate for Erosion in Earnings."



10) Applicant's motions to publish notice of its request for an earnings erosion adjustment are well made and applicant should be directed to publish legal notice as provided for in its filed motions.

11) Applicant should include within the legal notices to be published a provision stating that the rates shown therein are the rates proposed by Cincinnati Gas and Electric Company and that the rates ultimately authorized by this Commission may vary from the rates indicated. The notice published should also indicate the dates herein established for the filing of objections to the Staff's Report, the filing of prepared testimony, and the commencement of the public hearing.

12) The instant applications and P.U.C.O. Case No. 74-581-GA-AIR filed by applicant on September 4, 1974, contain common issues of fact and law. The three cases should be consolidated for purposes of public hearing.

13) A public hearing should be held to consider the above-entitled matters, commencing on July 12, 1976, at 9:30 A.M. at a place to be designated by subsequent Commission entry.

14) Applicant's testimony in support of its application shall be in writing submitted to the Commission and all parties who have been granted intervention, on or before June 28, 1976. This prepared testimony will not be orally read into the record. Each of the applicant's witnesses, whose testimony has been submitted in accordance with the above requirements, shall identify said testimony and tender it as an exhibit.

In consideration thereof, it is,

ORDERED, That applicant's motion of June 4, 1976, seeking to publish notice of its motion for an adjustment

in the proposed rates to compensate for erosion in earnings, be and hereby is granted. It is, further,

ORDERED, That applicant publish notice of its motion, in accordance with Findings 10 and 11 herein, once a week for three consecutive weeks, in larger than agate type, in a section other than the legal section of the newspapers of general circulation, serving the entire service area encompassed by the application, and present proof of service at the hearing. It is, further,

ORDERED, That objections to the Secretary's Report of Investigation be filed with the Commission on or before June 28, 1976. It is, further,

ORDERED, That prepared testimony be presented by applicant in accordance with Finding (14) above. It is, further,

ORDERED, That the public hearing for the consideration of the instant application commence on July 12, 1976, at 9:30 A.M., at a place to be designated by subsequent Commission Entry. It is, further,

ORDERED, That the Commission retain jurisdiction in this matter for all proper purposes.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Entered in the Journal
JUN 9 1976

/s/ Sally W. Bloomfield
Chairman

/s/ David Sweet

Commissioners

A True Copy

/s/ Randall G. Applegate
Randall G. Applegate
Secretary



## APPENDIX J

"Stipulated and agreed this 14th day of July, 1976, by Alan P. Buchmann on behalf of the Cincinnati Gas and Electric Company, and John W. Bentine on behalf of the Staff of the Public Utilities Commission of Ohio."

I would offer, likewise, Joint Exhibit No. 2.

EXAMINER ROYER: Could we conform our copy of Joint Exhibit 2 to correct the spelling of "adjustment" in Paragraph 3 and to change "100 cubic foot" to "100 cubic feet?"

MR. BUCHMANN: I will stipulate – I think we will both agree that the word "adjustment" should not have the "d" in it and that "100 cubic foot" should be "100 cubic feet."

EXAMINER ROYER: I am going to change this copy.

MR. RANDAZZO: Yes, your Honor.

EXAMINER ROYER: Mr. Goldberg, any objection?

MR. GOLDBERG: Yes, your Honor. Our objection is in two parts because the Joint Exhibits No. 1 and No. 2 do not have identical provisions.

I was called by counsel for the Staff, I think it was sometime last week. I know it was shortly prior to the time that we were scheduled to come out here for the hearing, and I was advised that a stipulation was under consideration of the nature you have been informed of in this proceeding. The inquiry was made whether Cincinnati Gas and Electric was disposed to enter into that stipulation.

At that time I did not know, nor was I informed, that, in fact, as I now understand the situation, there had been meetings between the Staff and the Company's represen-

tatives and an agreement had been reached with respect to terms of the stipulation. When I speak of terms, I speak of the 92 percent, plus the surcharge, plus uniform rates. I responded that I did not believe that the City of Cincinnati would be agreeable to entering into that stipulation, but that I would have to take it up with Mr. Luebbers, the City Solicitor, and that I did not believe that I would recommend to him that they join in it, and that I would call back Mr. Bentine.

Subsequent to that date, I received a call from Mr. Buchmann in which he inquired, advised me that there was this agreement with the Staff and with Intervenors. I am quite sure he did not represent at that time that all of the Intervenors had agreed. He asked if the City of Cincinnati would join that stipulation. My recollection of the word that he used was whether we were prepared to also surrender.

I advised Mr. Buchmann that I had received this call from the Staff, and I had communicated with Mr. Luebbers, and that we were not at this time going to join in such a stipulation.

In our judgment, there is prejudicial denial of due process to the City of Cincinnati by reason of the fact that sessions were held without prior notice to the City of Cincinnati, a party to the proceeding, between the Staff and the Company for the purpose of attempting to negotiate a settlement. No such meeting, in our view, should have been held without prior notice to the City of Cincinnati and with an opportunity to the City of Cincinnati to participate in those negotiations before any positions had become fixed.

Now, I expressed those views to Mr. Bentine at the opening of the hearing in the City of Cincinnati on the 12th of July, and shortly thereafter, after the conference that had been held on the record had terminated, I was



informed that there was going to be a conference with respect to the stipulation, and we were invited to participate and we did participate in that conference.

I submit, your Honor, that participation in the conference did not obliterate the denial of due process and prejudice that had already occurred, because that conference took place in the context of positions that had already been fixed without our presence.

We have a further objection to the stipulation as it is prepared in Joint Exhibit No. 1. It proposes that these proceedings be severed, namely the proceedings in 581 and 641 be severed, and that the stipulation in those two dockets be submitted forthwith for decision by the Commission.

Well, bear in mind, your Honor, that the Commission is being called upon to decide two very important issues that are common to all three dockets; namely, the question of whether the rate should or should not be uniform, and the question of whether the erosion adjustment should be spread equally among all of the jurisdictions.

For the Commission to decide forthwith that uniform rates are appropriate, to decide that the erosion adjustment as proposed by the company is appropriately applied, is to decide those issues in 75-205, in the midst of the hearing and before that issue comes before the Commission, we then have the Alice in Wonderland situation where we have verdict first and hearing afterwards.

I submit that the stipulation that calls upon the Commission to decide issues that are common, and I would imagine the fact of common issues bore on the Commission's decision to consolidate all three proceedings, would be the most egregious type denial of due process to the City of Cincinnati.

I also object on behalf of the City of Cincinnati to the stipulations because, as I see it, there will be no presentation in the proceedings in support of the stipulation in terms of its substantive determinations.

For all of these reasons, we would object to Joint Exhibit No. 1, Joint Exhibit No. 2, and we would ask that the stipulations, particularly the stipulation in 74-581 and 75-641, are to be transmitted to the Commission for their action, that our objections just stated on the record be certified to the Commission at the same time.

Thank you very much.

MR. RANDAZZO: Your Honor, I would just, on behalf of the Staff, think it would be appropriate for me to mention a couple of things.

I believe that although we were under some time pressure in this case because of the tremendous load of the Commission, we have made sincere and constant effort to involve each and every party to this proceeding in whatever discussions were had.

This went so far as to include the people who have not even shown up to enter an appearance in this proceeding.

I believe that it is the position of the Staff that, on the facts that have been presented in the Application of Cincinnati Gas & Electric, it would be in the best interests of those individuals who receive service and pay for that service from Cincinnati Gas & Electric to expedite this proceeding; and that based upon the review which the Staff has performed, and the request of the company, particularly in light of its reduction, that a resolution by way of stipulation, to the extent that the stipulation has been entered, is the most appropriate and the most beneficial way to accomplish what we are all interested in.



I believe that is all I will indicate. I do want to indicate that we did make an effort, and personally I contacted Mr. Goldberg and I was in a conversation where Mr. Bentine did also, and I would apologize for any shortness of time, but I would indicate that that is as much time as we had.

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## APPENDIX K

THE STATE OF OHIO,
City of Colubus.

1977 TERM

To wit: March 18, 1977

No. 76-1230

City of Cincinnati,
Appellant,

vs.

Public Utilities Commission of Ohio,
Appellee.

ENTRY

This cause is pending before the court on an appeal from the Public Utilities Commission of Ohio and upon consideration of the motion to dismiss, it is ordered by the court that this motion be, and the same hereby is, overruled.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. Page



IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18th day of March, 1977.

THOMAS STARTZMAN, Clerk.

By _____ Deputy.

IN THE

# Supreme Court of The United States

October Term, 1978

## No. 78-909

CITY OF CINCINNATI, OHIO
Petitioner

v.

PUBLIC UTILITIES COMMISSION OF OHIO, CINCINNATI GAS & ELECTRIC CO.
Respondents.

## BRIEF OF RESPONDENT PUBLIC UTILITIES COMMISSION OF OHIO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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## TABLE OF CONTENTS



## INDEX TO APPENDIX

## TABLE OF AUTHORITIES

IN THE

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Respondents.

## BRIEF OF RESPONDENT PUBLIC UTILITIES COMMISSION OF OHIO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

### STATEMENT OF THE CASE

The Respondent, Public Utilities Commission of Ohio ("PUCO"), will confine, as much as possible, its statement of the case to where it disagrees with the summary of the proceedings below contained in the Petition for Writ of Certiorari filed with this Court by the Petitioner City of Cincinnati ("Cincinnati"). In its statement of the case the PUCO will refer to the three cases which originated with the PUCO as follows:

1) The application of March 25, 1975, filed with the PUCO by the Cincinnati Gas and Electric Company ("CG&E") for an increase in rates for the gas service

it provides in the City of Cincinnati (Case No. 75-205-GA-AIR), will be referred to as "the 205 case".

2) CG&E's application of August 20, 1975, for an increase in rates for its gas service in 63 named municipalities located outside of the City of Cincinnati (Case No. 75-641-GA-AIR), which rates had been previously set by municipal ordinance contract, will be referred to as "the 641 case".[1]

3) CG&E's application of September 4, 1974, for an increase in rates for gas service which was not being provided (at that time) under municipal ordinance contract, including gas service to special contract or "interruptible" industrial customers, to unincorporated areas outside of the City of Cincinnati, and to incorporated areas outside of that city whose rates had not been previously established by municipal ordinance contract (Case No. 74-581-GA-AIR), will be referred to as "the 581 case".

As was correctly noted by Cincinnati in its Petition, by entry of June 9, 1976, the PUCO consolidated for hearing the 205, 641 and 581 cases because they presented "common issues of fact and law", and scheduled the consolidated hearing for July 12, 1976 (Petition, p. 5). However, Cincinnati erroneously concludes that by that entry, and by its appearance entered at the consolidated hearing, it became a party in *all three cases* (Petition, p. 5). On April 8, 1975, after all three cases had been filed with the Commission, Cincinnati filed a petition for leave to intervene *only* in the 205 case, the case fixing rates for service provided within its borders (Respondent's App., p. 21). By entry dated June 9, 1976, the same day the PUCO issued its entry consolidating the three cases for hearing, the PUCO granted Cincinnati's petition for intervention in the 205 case (Respondent's App., p. 24). Thus, of the three cases, Cincinnati applied for and the PUCO granted intervention only in the 205 case.

In its Petition, Cincinnati incorrectly interprets Section 1.04 of the PUCO's Code of Rules and Regulations (now Section 4901-1-04, O.A.C.) as having automatically conferred upon Cincinnati party status in the 581 and 641 cases at the time it entered its appearance at the consolidated hearing (Petition, p. 5; App. H, pp. 97a-98a). It is true that that rule states that a municipal corporation "may" become a party to a PUCO proceeding ". . . (d) by entering an appearance at the hearing." However, that rule has never been interpreted by the PUCO to allow intervention as a party in its proceedings merely by entering an appearance at hearing, without some showing of an "interest" in the proceeding and without the presiding hearing officer specifically ruling upon a request to intervene, neither of which occurred when Cincinnati made its appearance at the consolidated hearing. See the relevant portion of the PUCO's unreported opinion and order in

[1] Incorporated municipalities in Ohio are vested by Article XVIII, Sections 4 and 5, of the Constitution of Ohio (1851) with the authority to fix rates for the gas service provided to the customers within their boundaries (Respondent's App., p. 18). When these municipal ordinance rates expire, Ohio R.C. 4909.34 allows the gas utility to apply for an increase in rates for the gas service previously affected by the municipal ordinance, precisely as CG&E did in the 205 and 641 cases below when the municipal ordinance rates covering the service areas in those cases expired (Respondent's App., p. 18). As a result of the operation of the "home-rule" authority which municipalities enjoy in Ohio, the PUCO is often required to set rates in rate cases for less than a utility's entire service area.

*Sam Masters*, PUCO No. 73-678-C (1976) attached to this Brief (Respondent's App., pp. 41-42).

As a direct result of the above interpretation of Rule 1.04 of the PUCO's Code of Rules and Regulations, Cincinnati did not become a party to the 581 and 641 cases merely by entering its appearance on the first day of hearing. That appearance served *only* to enter Cincinnati's appearance as intervenor in the *only* case in which leave to intervene had been requested and granted, the 205 case. It is true, as Cincinnati is quick to point out in its Petition, that the PUCO moved to dismiss Cincinnati's appeal to the Supreme Court of Ohio from its opinion and order in the 581 and 641 cases citing various grounds, one of which was the same argument made here that Cincinnati was never a party to those cases (Petition, p. 7). However, although the Supreme Court of Ohio overruled that motion to dismiss, that Court did so without explaining its reasons (Petition, App. K, p. 108a). As a result, the overruling of the PUCO's motion to dismiss can hardly be cited, as Cincinnati does in its Petition, as evidence that the Supreme Court of Ohio disagreed with the PUCO's interpretation of its own rules (Petition, p. 7). Indeed, in its opinion in the case below, that Court suggested strongly its agreement with the conclusion of the PUCO that Cincinnati was a party only to the 205 case, when it noted in its summary of the facts that:

> "The parties in the other two cases moved that their actions be severed from the city's." (Petition, App. A, p. 2a)

Similarly, that Court stated the very question of law brought to this Court by Cincinnati's Petition as follows:



> "In its first proposition of law the city contends that the severance of *its case* [the 205 case] from the rate cases concerning the rest of the area serviced by the gas company [the 581 and 641 cases] denied the city due process of law . . ." (*emphasis added*) (Petition App. A, p. 3a)

Clearly, at no time in the proceedings below was Cincinnati considered a party to the 581 and 641 cases.

Because Cincinnati was not a party to the 581 and 641 cases, when the PUCO staff, CG&E and the Armco Steel Company (the parties to those cases) reached agreement on all of the issues in those cases (Petition, p. 5), and recommended that those cases be severed from the 205 case for decision (Petition, p. 6), those cases truly were "ripe" for decision for the simple reason that all parties to those cases had reached agreement on the issues presented by the applications in those cases (Petition, App. D, pp. 43a-44a).[2] Consequently, after the consolidated hearing (in which Cincinnati participated fully) had come to a close on July 22, 1976, the PUCO issued its opinion and order in the 581 and 641 cases, severing those cases for decision on the basis of the stipulation submitted at hearing by

[2] As Cincinnati points out in its Petition, among the issues upon which agreement was reached, the parties to the 581 and 641 cases jointly recommended approval of uniform rates for the service areas covered by the applications in those cases and recommended that a uniform earnings erosion adjustment of nine cents per Mcf be added to the rates fixed in each case (Petition, pp. 5-6). Contrary, however, to the repeated assertions made by Cincinnati in its Petition, the negotiations among the parties to the 581 and 641 cases which led to the stipulation in those cases did not conclude prior to Cincinnati being carefully informed of their pendency (Petition, App. A, pp. 3a-4a; App. D, pp. 43a-44a).

the parties to those cases (Petition, pp. 6-7; App. D, pp. 44a-45a). The PUCO accepted the recommendation of those parties that uniform rates be established for the service areas covered by those cases and that a uniform earnings erosion surcharge of nine cents per Mcf be added to the rates set in those cases (Petition, App. D, pp. 53a-54a). The PUCO was careful to make clear in its opinion and order, however, that:

> ". . . no inference should be drawn from the Commission's decision in these proceedings as to its position on matters not necessary for the decision, including those which may be contested in Case No. 75-205-GA-AIR." (Petition, App. D, p. 45a)

Obviously, however, Cincinnati did not find the PUCO's assurances very reassuring, because it argued before the Supreme Court of Ohio on appeal, and now in its Petition to this Court, that the severance of the 581 and 641 cases for decision and the PUCO's fixing of uniform rates and its allowance of a uniform nine cents per Mcf erosion adjustment in those cases, effectively precluded a different determination of those same issues in the 205 case (Petition, pp. 7, 9-14). Cincinnati claims that, as a result, it was deprived of a fair hearing in the 205 case (even though it participated fully in the consolidated hearing) in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution under what has come to be known as the Ashbacker doctrine, from *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 330 (1945) (Petition, pp. 9-10).[3]

[3] *Ashbacker Radio Corp. v. F.C.C., supra,* stands for the proposition that if two applications pending before an administrative agency are "mutually exclusive", that is, the granting of one cannot be made without effectively denying the other, then a decision by that administrative agency to hold a separate hearing on one of the applications first can render any right to a hearing on the second application "an empty thing."



However, not only is the Ashbacker doctrine inapplicable to the circumstances of the proceedings below, as the Supreme Court of Ohio concluded in its opinion in this case (Petition, App. A., pp. 3a-5a), but Cincinnati's argument supporting its Petition for Writ of Certiorari assumes incorrectly that it had a constitutionally protected right to a hearing in the 205 case which could have been denied under any circumstances. Thus, Cincinnati has not presented to this Court a sufficient federal question to enable it to invoke its jurisdiction under 28 U.S.C. 1257(3). The PUCO will elaborate on each of these points in its Argument below supporting its conclusion that Cincinnati's Petition for Writ of Certiorari should be denied.

## QUESTIONS PRESENTED

Do utility ratepayers have a sufficient property right in any fixed rate for intrastate utility services to entitle them to the protection of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution when a state utility commission considers an application for an increase in that fixed utility rate?

Assuming utility ratepayers have a constitutionally guaranteed right to a hearing when their intrastate utility rates are changed pursuant to state law by a state utility commission, can that right to a hearing be effectively denied by the severance of a prior case from the case in which their rates are to be set, and the resolution of common issues of fact and law in that prior case, where neither state law nor the opinion

issued by the state utility commission in the prior case would require the same decision on those common issues?

## ARGUMENT

Cincinnati's Petition for Writ of Certiorari can be denied on any of three grounds.

1) First of all, Cincinnati simply has failed to demonstrate in its Petition that the issue it raised in that Petition involves a federal question. As a result, it has failed to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3). To do that, it must be stressed, a mere assertion of a claim with respect to some constitutional right is not enough. See *U.S. Fidelity & Guaranty Co. v. State of Oklahoma*, 250 U.S. 111 (1919).

Before Cincinnati can be heard to claim before this Court that any constitutionally protected right to a hearing in the 205 case was effectively denied when the 581 and 641 cases were severed for decision (under the theory advanced in *Ashbacker Radio Corp. v. F.C.C., supra*), it must *first* demonstrate that it had such a right to a hearing in the 205 case guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A right cannot be denied if its does not exist.

Unfortunately for Cincinnati's claim, however, it is a rather well-settled principle of law that utility ratepayers have no constitutional right to a hearing under the United States Constitution in state administrative proceedings fixing intrastate utility rates.[4] Any right

[4] It should be noted that the Supreme Court of Ohio did not address this particular question in its opinion in this case, choosing instead to ground its decision on the applicability of the Ashbacker doctrine to the facts of this case (Petition, App. A, pp. 3a-5a).



to a hearing for utility ratepayers in such proceedings is strictly statutory. As stated in *California Pub. Util. Comm. v. United States*, 356 F. 2d 236, 241 (9 Cir. 1966), *cert. den.*, 385 U.S. 816, with respect to the right to a hearing:

> ". . . Public utility regulation, historically, has been a function of the legislature; and the prescription of public utility rates by a regulatory commission, as the authorized representative of the legislature, is recognized to be essentially a legislative act. . . As a ratepayer would have no constitutional right to participate in a legislative procedure setting rates, this right to be heard in a Commission proceeding exists at all only as a statutory and not a constitutional right."

See also *Teleco Inc. v. Southwestern Bell Tel. Co.*, 511 F. 2d. 949 (10 Cir. 1975), *cert. den.* 423 U.S. 875; and *Chickasha Cotton Oil Co. v. The Corp. Comm. of the State of Oklahoma*, 562 P. 2d. 507 (Sup. Ct. Okla., 1977), *cert. den.*, 434 U.S. 829, to the same effect.

Perhaps, however, the Court in *Sellers v. Iowa Power and Light Co.*, 372 F. Supp. 1169, 1172 (S.D. Iowa, 1974) explained it best, in a case brought by certain welfare recipients challenging the constitutionality of an Iowa statute permitting public utilities requesting rate increases to post bond and begin collecting the proposed increase without hearing:

> "Plaintiffs describe the property they claim was taken from them without procedural due process as the money required to pay the rate increases prior to the determination of their legality, . . . We believe plaintiffs' claim of property interest is too broadly stated to be within the protection of the Fourteenth Amendment. In our opinion plaintiffs must show they have a legal entitlement or a

> vested right in the rates being charged before the proposed increase, before they can claim any property rights protected by the United States Constitution. . .
> Conversely, utility customers have no vested rights in any fixed utility rates [citations omitted]."

The cases cited by Cincinnati in its Petition do not contradict the principles expressed above (Petition, p. 9). The right to a hearing involved in *Ashbacker Radio Corp. v. F.C.C., supra,* which right was effectively denied under the facts of that case by the prior granting of one of two "mutually exclusive" applications for broadcast authority, was a right to a hearing established by *federal statute,* not the United States Constitution. The remainder of the cases cited by Cincinnati at page 9 if its Petition simply do not stand for the proposition that utility ratepayers have a sufficient property right in any fixed rate for intrastate utility services to entitle them to the protection of the Due Process Clause of the Fourteenth Amendment in state utility rate proceedings. Finally, in *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 301 U.S. 292 (1937), from which Cincinnati quotes at page 15 of its Petition, this Court invoked only the constitutional guarantees afforded to a utility, not to its ratepayers, in state ratemaking proceedings. That case concerned an appeal *by the company* from an order in which the PUCO took judicial notice of price trends and property valuations without revealing the source of the information to the company. In discussing the constitutional right to a hearing in the language quoted from that opinion by Cincinnati, this Court was referring only to the constitutional protection to which a utility is entitled from confiscatory rates. See also *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1943).



Because Cincinnati had no constitutional right to a hearing in the 205 case, the only right to a hearing which Cincinnati can claim was effectively denied in the 205 case under the Ashbacker doctrine (by the severing for decision of the 581 and 641 cases) was a statutory right to a hearing provided under *Ohio law.* Indeed, it is apparently Cincinnati's theory that it was just such a statutory right to a hearing, i.e., the hearing for which Ohio R.C. 4909.19 provides, which was denied in this case (Petition pp. 8-9). However, whether or not a right to a hearing established by Ohio law was or was not denied under the facts of the present case is *not* a federal question, and is certainly not a question which Cincinnati raised in its appeal below to the Supreme Court of Ohio. As a result, Cincinnati simply has not stated in its Petition sufficient grounds to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257 (3).

2) In any event, even if it is assumed that Cincinnati had a constitutional right to a hearing in the 205 case, Cincinnati has not demonstrated in its Petition that that right to a hearing was effectively denied under the Ashbacker doctrine when the 581 and 641 cases were severed for decision. Cincinnati claims that its right to a hearing in the 205 case became an "empty thing" once the Commission adopted uniform rates in the 581 and 641 cases and once it allowed in each case an adjustment to CG&E's rates of nine cents per Mcf to account for lost gas sales. Cincinnati argues that the determination of those issues in those earlier cases on the basis of the stipulation submitted by all the parties to those cases "effectively" bound the Commission to make the same determination in the 205 case (Petition, pp. 10-13). Unfortunately, Cincinnati's assertion

is belied by even a cursory reading of the PUCO's orders in the 581 and 641 cases and in the 205 case.

In the 581 and 641 cases the PUCO adhered strictly to the procedure outlined by the Supreme Court of Ohio in *City of Cleveland et al. v. Pub. Util. Comm.*, 164 Ohio St. 442, 132 N.E. 2d. 216 (1956), for the establishment of reasonable utility rates under the then applicable Ohio law. The PUCO first determined the value of CG&E's property devoted to providing natural gas service to the customers affected by each application, assessed the allocated portion of CG&E's total company test-year expenses attributable to providing service to the service areas in each case, calculated the rate of return on rate base which would be earned by CG&E in each case from the stipulated uniform rates, and determined that those rates of return, although not equal, were reasonable (Petition, App. D, pp. 45a-52a). It was this analysis that allowed the Commission to find that the stipulated uniform rates would be reasonable if adopted in the 581 and 641 cases (Petition, App. D, p. 52a).

It must be stressed that because each of the applications in those two cases covered only a portion of CG&E's total service area it was necessary to allocate CG&E's total plant in service and system-wide test year revenue and expense accounts to the areas covered by each application. In other words, certain system-wide accounts had to be allocated, through proper allocation procedures, in order to eliminate from consideration CG&E's operations not covered by the application in each case. It must also be stressed that because each of the applications in those two cases covered only a portion of CG&E's total service area the Commission did *not*, in its opinion and order in those cases, determine what system-wide costs of service the company should be allowed to recover from its rates, nor did the Commission determine an overall rate of return the company should be allowed to earn from its entire operations, contrary to what Cincinnati suggests in its Petition (Petition, pp. 10, 12). System-wide totals in those two cases were relevant only as a necessary starting point for the allocation of costs to the service areas covered by the two cases. Finally, it must be stressed that in its opinion and order in the 581 and 641 cases the Commission did *not* adopt uniform rates for all of CG&E's service territory, but for only the service areas covered by those two cases (Petition, App. D, p. 53a), contrary to the suggestion made by Cincinnati in its Petition that in the 581 and 641 cases the Commission committed itself to system-wide uniform rates (Petition, pp. 10-11). Thus, under the procedure outlined above, as dictated by the then applicable Ohio law, the rate base, test-year expense and rate of return determinations in each of the 581 and 641 cases, and the uniform rates which those determinations justified in those cases, had to do only with CG&E's operations in the service areas covered in those cases.[5]



The precise rate-fixing method outlined above was followed by the PUCO in the 205 case. In its opinion and order in that case the PUCO established the value of CG&E's property devoted to providing natural gas service within Cincinnati's borders, determined the al-

[5] As was explained above the PUCO is often required to set rates for less than a utility's entire service area, primarily because of the right of municipalities in Ohio to fix the rates for utility service provided within their borders. As a result the PUCO must often resort to the ratemaking procedure outlined above.

located test-year expenses attributable to providing service to those customers, calculated the rate of return on the rate base which CG&E would earn should the uniform rates approved in the 581 and 641 cases be extended to the customers affected by the 205 case, and determined that that rate of return was reasonable (Petition, App. E, pp. 70a-77a). As a result, the Commission was able to conclude that it was reasonable to extend the rates fixed in the 581 and 641 cases to the 205 case.

Understanding the above, it becomes clear that had the record in the 205 case indicated that it would not have been reasonable to extend the uniform rates to that case (in other words, had the PUCO found that those uniform rates would have resulted in an excessive rate of return in that case), the Commission could have and *would have* refused to so extend those rates. It certainly was not prohibited under Ohio law from doing so, as the Supreme Court of Ohio explained in its opinion below (Petition, App. A, p. 5a). This is true because, as was explained above, the order in the 581 and 641 cases affected a completely different set of customers than those affected by the 205 case, and was, as a result, predicated under Ohio law on separate rate bases and separate jurisdictional allocations of test year revenues and expenses. Thus, by no stretch of the imagination did the adoption of uniform rates in the 581 and 641 cases render any right to a hearing Cincinnati may have had in the 205 cases an "empty thing" within the meaning of the Ashbacker doctrine.

For similar reasons, the decision of the Commission in the 581 and 641 cases to adopt the nine cents per Mcf earnings erosion adjustment did not preclude a different determination on that issue in the 205 case.



In the 581 and 641 cases the Commission did not authorize CG&E to adjust by nine cents per Mcf the rates applicable to all of its customers. It authorized CG&E to adjust only the rates covered by the applications in those two cases by nine cents per Mcf, as stipulated by the parties to those cases, to allow CG&E to recover from its customers in those cases an allocated share of the loss in revenues resulting from the decline in sales to interruptible customers (Petition, App. D, p. 54a). That decision certainly did not preclude Cincinnati from presenting evidence in the 205 case which might show that it would be inappropriate to attribute to CG&E's customers in the City of Cincinnati any share of that loss in revenues, nor would it have prevented the Commission from accepting Cincinnati's arguments in that regard in the 205 case, as justification for a refusal to allow the nine cents per Mcf curtailment adjustment in that case, had they been persuasive. For the reasons why those arguments were not persuasive see the portion of the Commission's order in the 205 case at Petition, App. E, pp. 77a-79a.

3) Hopefully, it is clear from the above discussion that this Court can deny Cincinnati's Petition for Writ of Certiorari for two reasons. First of all, because neither Cincinnati, nor the ratepayers it represented, had a constitutional right to a hearing in the 205 case, Cincinnati has failed to present to this Court a federal question for its determination and has, as a result, failed to invoke its jurisdiction under 28 U.S.C. 1257 (3). Secondly, even if Cincinnati had such a constitutional right to a hearing, it in fact was given a hearing in the 205 case which did not become an "empty thing" within the meaning of the Ashbacker doctrine once the Commission severed the 581 and 641 cases from that

case and once the Commission reached its determination on the issues of uniform rates and the curtailment adjustment in those prior two cases. However, there is a third reason why this Court should be reluctant to grant Cincinnati's Petition. Incorporated municipalities in Ohio, such as Cincinnati, enjoy a rather unique status as consumers of utility services and as representatives of those consumers. As was indicated above, incorporated municipalities are vested by Article XVIII, Sections 4 and 5, of the Constitution of Ohio (1851) with the authority to fix rates for the gas services provided within their boundaries (Respondent's App., p. 18). These rights are further codified in Ohio R.C. 4909.34, which also grants to utilities in Ohio the right to appeal to the PUCO any rates established by municipal ordinance that they believe unreasonable (Respondent's App., p. 18).

As a result of the "home-rule" authority enjoyed by municipalities in Ohio, even if this Court can determine that Cincinnati had a constitutional right to a hearing in the 205 case and even if this Court can determine that that right was effectively denied under the Ashbacker doctrine, Cincinnati has, in effect, asked this Court to render an advisory opinion on the issues raised in its Petition. Of what practical necessity is a ruling by this Court that Cincinnati was denied a hearing in the 205 case, if Cincinnati presently has complete authority under Ohio law to pass a municipal ordinance fixing whatever rates for gas service provided within its borders it finds reasonable. Even if CG&E were to appeal those ordinance rates to the PUCO under Ohio R.C. 4909.34, Cincinnati would participate in the hearing for which that section provides (Respondent's App., p. 18). This Court has already



cautioned Cincinnati, in another context, that it will not decide important constitutional questions unnecessarily or hypothetically. *City of Cincinnati v. Vester*, 281 U.S. 439, 448-449 (1930).

## CONCLUSION

For all of the reasons indicated above Cincinnati's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. BROWN
*Attorney General of Ohio*

MARVIN I. RESNIK
*Assistant Attorney General*
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## APPENDIX

### §4, Article XVIII, Constitution of Ohio (1851)

Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

### §5, Article XVIII, Constitution of Ohio (1851)

Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission.

### §4909.34, Ohio Revised Code

Any municipal corporation in which any public utility is established may, by ordinance, at any time within one year before the expiration of any contract entered



into under sections 715.34, 743.26, and 743.28 of the Revised Code between the municipal corporation and such public utility with respect to the rate, price, charge, toll, or rental to be made, charged, demanded, collected, or exacted, for any commodity, utility, or service by such public utility, or at any other time authorized by law, proceed to fix the price, rate, charge, toll, or rental that such public utility may charge, demand, exact, or collect for such commodity, utility, or service for an ensuing period as provided in such sections, provided that:

(A) Upon complaint in writing by any such public utility which has not filed, prior to the passage of such ordinance, a written application with the public utilities commission pursuant to section 4909.18 or 4909.35 of the Revised Code covering the municipal corporation, the public utilities commission shall give thirty days' notice of the filing and pendency of such complaint, and of the time and place of the hearing of it, to the public utility and the mayor of such municipal corporation, which notice shall plainly state the matters complained of.

(B) If at the time of passage of the ordinance provided for in this section or in section 715.34, 743.26, or 743.28 of the Revised Code any such public utility has on file a written application with the public utilities commission pursuant to section 4909.18 or 4909.35 of the Revised Code covering such municipal corporation, the passage of such ordinance shall not operate to divest the public utilities commission of jurisdiction over the application of such public utility or any part thereof, unless such public utility files a written acceptance of such ordinance as provided in section 743.28 of the Revised Code, whereupon the commission shall dismiss the application insofar as it covers such municipality. If such public utility does not accept such

ordinance, it shall so notify the municipality and the public utilities commission within thirty days after the passage of such ordinance, and such notification shall be deemed to be the consent of such public utility to continue to furnish its product or service and devote its property engaged in so furnishing its product or service to such public use during the term so fixed by prior contract with such municipality or by Chapters 4901., 4903., 4905., 4909., 4921., 4923., and 4925. of the Revised Code. Upon receipt of notification by such public utility that it does not accept such ordinance, the public utilities commission shall proceed to rule upon the application which such public utility has filed pursuant to section 4909.18 or 4909.35 of the Revised Code and, as a part of such proceedings, shall fix and determine the just and reasonable rate, fare, charge, toll, rental or service to be rendered, charged, demanded, exacted, or collected for the product or service of such public utility within such municipality.



**Before the**

**PUBLIC UTILITIES COMMISSION OF OHIO**

**No. 75-205-GA-AIR**

**IN THE MATTER OF THE APPLICATION OF THE CINCINNATI GAS & ELECTRIC COMPANY FOR AN INCREASE IN ITS GAS RATES IN THE CITY OF CINCINNATI.**

## PETITION FOR LEAVE TO INTERVENE OF CITY OF CINCINNATI

Now comes the City of Cincinnati (Cincinnati) and petitions the Public Utilities Commission of Ohio for leave to intervene in the above captioned case pursuant to Section 1.04 of the Code of Rules and Regulations of the Public Utilities Commission of Ohio.

Petitioner states the following:

1. Petitioner is a municipal corporation under the constitution and laws of the State of Ohio.

2. Petitioner's interest in this case consists of opposition to the increase in gas rates proposed for the City of Cincinnati by the Cincinnati Gas and Electric Company, which increases may be unjust, discriminatory, unreasonable and without valid cost foundation.

3. Petitioner, on behalf of itself, as a customer, and its gas rate paying public in Cincinnati, has a direct, real and substantial interest in this case, which is not otherwise adequately represented, and Petitioner should be permitted to intervene and protect such interest as to issues of fact and law that may be raised in the proceeding.

4. The names and addresses of attorneys to whom copies of filings, orders, etc. are to be mailed and who are authorized to make appearances on behalf of the City of Cincinnati are:

THOMAS A. LEUBBERS
*City Solicitor*
Room 214, City Hall
Cincinnati, Ohio 45202
Telephone: (513) 352-3334

W. PETER HEILE
*Assistant City Solicitor*
Room 214, City Hall
Cincinnati, Ohio 45202
Telephone, (513) 352-3323

REUBEN GOLDBERG, ESQ.
Suite 550
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 659-2333

WHEREFORE, Petitioner respectfully requests that the Commission grant it permission to intervene and be made a party herein, to have notice of hearing, to appear by counsel, to participate in cross-examination, and to present for consideration of the Commission through exhibits and witnesses, such evidence as may be relevant to the issues and matters involved in this proceeding.

/s/ THOMAS A. LUEBBERS
*City Solicitor*
Room 214, City Hall
Cincinnati, Ohio 45202
Telephone: (513) 352-3334



## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition upon all known parties or their counsel of record in this proceeding in accordance with Section 1.07 of Commission Rules and Regulations, this 8th day of April, 1975.

/s/ THOMAS A. LUEBBERS
*City Solicitor*

Dated: April 8, 1975.

**Before**

**THE PUBLIC UTILITIES COMMISSION**

**OF OHIO**

**Case No. 75-205-GA-AIR**

**IN THE MATTER OF THE APPLICATION OF THE CINCINNATI GAS AND ELECTRIC COMPANY FOR AN INCREASE IN ITS GAS RATES IN THE CITY OF CINCINNATI.**

**ENTRY**

The Commission, coming now to consider the petitions for leave to intervene filed in the above-entitled matter by the City of Cincinnati on April 8, 1975, and by Proctor and Gamble Company filed on August 18, 1975, finds that:

1) Pursuant to Section 1.04 of the Commission's Code of Rules and Regulations, a petition for leave to intervene in a proceeding shall set forth the petitioner's interest in the proceeding.

2) The above petitions set forth the petitioners' interests in this proceeding.

3) The above petitioners' stated interests do appear to be valid interests in this proceeding.

4) The above petitions for leave to intervene should be granted.

5) Leave granted on a petition to intervene entitles the intervenor to appear as a party to the proceeding, file an answer or other pleading, have notice of hearing, produce and cross-examine witnesses, and be heard in person or by counsel.



It is, therefore,

ORDERED, That the above petitions for leave to intervene be, and hereby are, granted. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record and such other persons as the Commission shall deem interested.

THE PUBLIC UTILITIES COMMISSION
OF OHIO

/s/ SALLY W. BLOOMFIELD
/s/ DAVID SWEET

*Commissioners*

Entered in the Journal June 9, 1976. A True Copy.

/s/ RANDALL G. APPLEGATE

*Secretary*

**Before**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**Case No. 73-678-C**

**IN THE MATTER OF THE APPLICATION OF SAM MASTERS, DBA MASTERS TRANSFER SERVICE, WOODSFIELD, OHIO, TRANSFEROR, AND CLYDE G. CLIFT, GRAYSVILLE, OHIO, TRANSFEREE, FOR CONSENT TO TRANSFER CERTIFICATES 3186-I AND 5376-I.**

## OPINION AND ORDER

The Commission coming now to consider the above-entitled matter, the application filed September 10, 1973; the application filed April 10, 1974; the record made upon public hearings held October 16, 1973, November 1, 1973, December 27, 1973, and April 11, 1974; the report and recommendation of the attorney examiner filed on August 7, 1974; the exceptions to the report and recommendations of the attorney examiner filed on behalf of protestants A. L. Dressler and John D. Tonkovich received on August 19, 1974; the reply to exceptions filed on behalf of Sam Masters, dba Masters Transfer Service and Robert Neff and Sons, Inc., (transferee by assignment); and being otherwise fully advised in the premises, hereby issues its Opinion and Order in conformity with the provisions of Section 4903.09 Revised Code.

OPINION:

On September 10, 1973, Sam Masters, dba Masters Transfer Service, applicant-transferor, and Clyde Clift, an individual, applicant-transferee filed a joint application with this Commission to transfer Certificates of Public Convenience and Necessity Nos. 5376-I and 3186-I. The authority and service description pursuant to Certificate No. 5376-I reads:



> "Property from and to Barnesville, Ohio, and the territory within a five (5) mile radius therefrom.
>
> RESTRICTED as to each shipper now or hereafter listed under Contract Carrier Permit No. 3896, against furnishing the same kind and character of service under Certificate No. 5376-I as is authorized to be furnished such shipper pursuant to the terms of its contract on file with, and approved by, the Commission."

The authority and service description pursuant to Certificate No. 3186-I reads:

> "Property from all points in Monroe County to all points in the State of Ohio and reverse.
>
> RESTRICTED as to each shipper now or hereafter listed under Contract Carrier Permit No. 3896, against furnishing the same kind and character of service under Certificate No. 3186-I as is authorized to be furnished such shipper pursuant to the terms of its contract on file with, and approved by, the Commission."

The Commission, in an effort to place its discussion of the issues raised in proper perspective, deems it necessary to enter upon a brief chronology hereof.

> *Public hearing on September 10, 1973*: An appearance was tendered on behalf of the original transferee, Clyde G. Clift. Counsel informed the examiner that the transferor, Sam Masters was gravely ill and confined in a hospital. The record reveals that a power of attorney (App. Exhibit 1) had been executed on October 12, 1973, designating Mr. James R. Stiverson, Attorney at Law, as Master's attorney in fact for purposes of giving testimony and the performance of all acts necessary for transfer of Certificate Nos. 5376-I and 3186-I. Appearances in opposition were tendered

on behalf of three concerned citizen residents of Monroe County (sitis of certificates) attacking the fitness of Clyde G. Clift to hold authority. The record made on that date consisted of the transferee Clift's testimony and cross examination.

*Continued public hearing November 1, 1973*: Appearance made on behalf of Sam Masters (transferor) by Mr. James R. Stiverson, under the aforementioned power of attorney. The examiner marked the document (App. Exhibit 1) and, upon receiving the same into evidence, testimony was taken with respect to operations conducted under the authorities, the transaction under consideration, and the reasons for Master's desire to transfer. No appearances were tendered in opposition as the original three intervening citizens were only concerned with the fitness of Clift.

*Continued public hearing December 27, 1973*: Appearnces were tendered on behalf of Sam Masters, transferor, Clyde Clift, original transferee, and Robert Neff and Sons, Inc., as the new transferee by assignment of interest from Clyde G. Clift. The examiner was informed that on November 19, 1973, Clift and Robert Neff entered into an Assignment of Interest (App. Exhibit 15) wherein the parties (Clift and Neff) mutually agreed that Neff should be substituted as a principal (transferee) in the agreement between Masters and Clift. Continuing appearances in opposition tendered on behalf of three Monroe County Citizens. The examiner was informed that in the interim, a third party, one A. L. Dressler, had filed in the Muskingum County Court of Common Pleas for a temporary and permanent restraining order seeking to prevent Masters, Clift and/or Neff from transferring the authorities. The file reveals a document entitled Temporary Restraining Order, dated December 26, 1973, Case No. 73-867 which granted the T.R.O. to Dressler. In essence,



Dressler alleged a contract for purchase of the certificates conditioned upon the failure of Masters to transfer to Clift for any reason. The parties, being subject to the provisions of the T.R.O. issued in Muskingum County, sought and were granted a continuance by the examiner, recognizing that, at least until January 3, 1974, when the restraining order expired or was dissolved by the Court, the parties were bound by its provisions.

*Continued public hearing April 11, 1974*: First formal appearance tendered on behalf of A. L. Dressler as a protestant, claiming a written contract for purchase of the authorities from Masters which he contended cut off any right of assignment between Clift and Neff. Also, one John D. Tonkovich tendered an appearance in opposition alleging an oral agreement with Masters for purchase and sale of the authorities. The examiner was informed that on March 22, 1974, the Court of Common Pleas in Muskingum County issued a Judgement Entry (in file) in Case No. 73-867, finding that the plaintiff (Dressler) was not entitled to a preliminary or permanent injunction nor to any other or further relief prayed for and dismissed the case. The protestants Dressler and Tonkovich and intervening citizens argued that the Commission should continue the case pending a filing in the courts to resolve the conflicting contractural claims. The hearing examiner formally accepted the assignment of interest between Clift and Neff and substituted proper application, exhibits and publication in the Commission's official file reflecting the substitution of transferees. The examiner, after the substantial argument, denied protestants' and intervenors' motion to continue and found that neither Dressler nor Tonovich had demonstrated sufficient factual or legal interest in the outcome of the transaction before the Commission to permit them to continue to participate in opposition as

protestants and/or intervenors. The examiner further found, on the basis of the accepted assignment of interest completing the substitution of transferees, that the three intervening Monroe County residents opposing Clift's status no longer had standing to pursue their opposition. The examiner, subsequent to the aforesaid dismissals, proceeded to hear evidence of the substitute transferees's fitness to receive authority and thereafter submitted the case upon the record.

Having reviewed the actual sequence of events leading to the attorney examiner's August 7, 1974 recommendation that the Commission approve the proposed transfer from Sam Masters, dba Masters Transfer Service to Robert Neff and Sons, Inc., the Commission will now review the facts and law upon which such action was recommended.

Pursuant to Section 4921.13 Revised Code, an application may be made for consent to transfer a certificate of public convenience and necessity. In order to effectuate such a transfer, the applicants must cause publication of the application to be made in a newspaper of general circulation published at the county seat of the county in which the principal place of business of the applicant is located. Said publication must appear once a week for three consecutive weeks prior to the hearing. Furthermore, the application must comply with the form as required by the Commission's Rules and Regulations Section 3.08 as read on conjunction with Section 3.03.

The applicants Sam Masters dba Masters Transfer Service and Robert Neff and Sons, Inc., have caused publication to appear once a week for three consecutive weeks in *The Monroe County Beacon* and *The Times Recorder*, being newspapers of general circulation in



Monroe County and Muskingum County, wherein are located the principal places of business of the transferor and the new transferee respectively. In that this application and publication have been made in accordance with Section 4921.13 Revised Code and Sections 3.08 and 3.03 of the Commission's Rules and Regulations, the Commission has jurisdiction to hear and consider the issues contained herein.

The standards by which the Commission is guided in an application to transfer motor carrier authority, as set out in the *Frank Cartage Co.*, Case No. 34,452, are as follows:

(1) The reason for the proposed transfer and why the action would be in the public interest.

(2) That the authority sought to be transferred is in good standing with the Commission and that the transferor's operations and authority have been lawful.

(3) That there is no duplicative authority presently held by either the transferor or the transferee.

(4) That the price to be paid for the authority is reasonable and there will be no adverse financial effect on the claim of any creditors of the transferor.

(5) That there is a continuing use and need for the services performed under the authority and that the proposed transferee will provide the same or better service than now provided.

(6) That the applicant is a proper party to receive the authority and is knowledgeable of the Rules and Regulations of the Commission

and the laws of Ohio and possesses the requisite ability and experience and equipment to perform the service in question.

(7) That there are no outstanding taxes due from the transferor.

The record made at the November 1, 1973, hearing wherein testimony was taken on behalf of the transferor under power of attorney reveals the following facts:

(1) Mr. James R. Stiverson identified the power of attorney executed by Sam Masters on November 19, 1973 from which his authority to appear and testify is derived.

(2) The record reveals that Masters has conducted operations as a sole proprietor under both certificates for at least eighteen (18) years.

(3) The record of testimony reveals that both Mr. and Mrs. Masters are quite elderly and, especially Mr. Masters, was stated to be in poor health being confined in the hospital at the time of the hearing.

(4) Mr. Stiverson testified that he has represented Masters for eighteen (18) years and has, through such relationship, become very familiar with the type of operation conducted thereby.

(5) The signature on the contract was verified and it was stated that the $8,050.00 purchase price agreed upon for the certificates and one piece of equipment was considered fair and reasonable in relation to the volume of service provided and the kind of operations conducted.



(6) The witness, upon review of certain traffic and revenue information submitted, testified that a modest profit was generated during 1973 conducting business on a daily basis with two trucks.

(7) It was stated that the transferor was in sound financial condition with no appreciable debts.

(8) All taxes have been paid and the authorities are in good standing.

(9) In summary it was indicated that there is a continuing volume of business necessitating transportation service which, due to age and poor health, the transferor is no longer able to accommodate in accord with the statutory obligations of a common carrier.

The president of the applicant transferee (by assignment) appeared and submitted testimony and exhibits concerning his company's participation in the subject transaction. The record of testimony, exhibits and the Commission's file reveal the following pertinent considerations.

(1) The record reveals that the applicant transferee, Robert Neff and Sons, Inc., maintains its principal place of business in Zanesville, Muskingum County, Ohio, holds Certificate No. 2396 (Belmont County), and either has, or is acquiring, interests in several other regulated transportation operations.

(2) Robert Neff and Sons, Inc., has no objection to a duplicate service restriction being placed on its certificates if the instant application is granted.

(3) The record and exhibits reveal that the applicant transferee is in sound financial condition and operates sufficient pieces of equipment of various designs and uses to render service under the authorities it seeks to acquire.

(4) The record reveals that the transferee has conducted a motor transportation business since 1930 with no outstanding citations against its operation or taxes due the State of Ohio.

(5) The record reveals that upon being approached by the original transferee Clift, and appraised of the situation, Robert Neff made inquiries into the kind and character of need for service under the two certificates and, determining that such need existed, entered into the assignment of interest agreement with Clift.

(6) The record reveals that Neff has complied with the conditions specified in the contract between Clift and Masters with Clift having no further interest in the transaction and Neff ready, willing and able to consummate the contract and render service under the authorities.

(7) The transferee has conducted an investigation with respect to the needs of the shipping public in Monroe County and estimates revenues to be generated during the first full year of operations under the certificates approximating 60 to 70 thousand dollars, doubling in another year.

(8) Monroe County is forty miles from the applicant transferee's facilities in Muskingum



County and, if the instant application is granted, applicant contemplates establishment of a permanent facility in said county.

(9) The applicant, if it receives the authorities in question, proposes to conduct operations thereunder and has no outstanding agreements with Clyde G. Clift, the original transferee, or any other party.

(10) Robert Neff testified that the agreed upon purchase price of $8,000 is reasonable and has already been placed in escrow according to the terms of the contract.

The reporting examiner issued his report and recommendation on August 7, 1974. The examiner found that the transaction under consideration, being the transfer of Certificate Nos. 3186-I and 5376-I from Sam Masters dba Masters Transfer Service, to Robert Neff and Sons, Inc., was not adverse to the public interest nor the policy of regulation of transportation. The examiner found all procedural requirements satisfied, and that the guidelines for consideration of such cases set forth in *Frank Cartage Co.*, (supra) were followed. The examiner recommended that the application under consideration be granted.

The Commission, before proceeding with a discussion of the exceptions and reply, takes note of certain intervening officially recorded occurrences between the close of proceedings and the preparation of this order. The Commission has been informed that Mr. Masters, who was confined in a hospital upon public hearings herein, has died. The Commission's file reflects receipt of the following documents:

(1) Affidavit of deceased's wife, Virginia Masters, attesting to her status as sole beneficiary

of Sam Masters, (copy of Last Will & Testament in file) and her consent to consummate the transfer of Certificate Nos. 3186-I and 5376-I from the estate of Sam Masters, to Robert Neff and Sons, Inc.

(2) A copy of a Journal Entry in Case No. 4912, *In the Matter of the Estate of Sam Masters, Deceased,* ordering Virginia Masters, executrix of the estate of Sam Masters, deceased, to complete the terms of the contract of transfer of Certificate Nos. 3186-I and 5376-I.

(3) A certificate signed by Deputy Clerk of Court of Common Pleas, Monroe County, attesting to the authenticity of the aforesaid copy of a Journal Entry.

(4) Robert Neff and Sons, Inc., was granted temporary authority to conduct operations under the subject certificates on May 14, 1974.

The Commission further notes with interest that the exceptions filed herein on August 19, 1974 by Tonkovich and Dressler, do not raise issues which are common to legal and factual analysis in a proceeding, the import of which is a transfer of authority. Rather, the exceptions raise four questions concerning the examiner's rulings upon public hearing regarding standing and evidence.

The issues raised are:

(1) Was there error in accepting testimony from James Stiverson, representing the ailing transferor, under a power of attorney rather than requiring at least a deposition? (Rules



3.02C, 3.08 and 1.12) pertinent parts of said rules specified by protestants are.
(3.02c)

"Every applicant shall appear in person, or by corporate officer, upon the date set for hearing."

". . . . Failure of applicants to appear at the hearing is cause for dismissal."
(3.08)

"When a personal representative, surviving partner, receivor, trustee, or other fiduciary continues the operation of a certificate under the provisions of Section 4921.13 or 4923.09 Revised Code, notice in writing must be given to the Commission setting forth such change in the operation of the certificate and stating the reason therefore."
(1.12)

"The testimony of a witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Public Utilities Commission."

(2) Was there error in the examiner's finding that protestants Tonkovich and Dressler (both claiming rights under oral or written contracts with the transferor) had no discernible interest over which the Commission had jurisdiction and that said appearances were untimely and prejudicial?. (fourth day of public hearing) (exceptions raise Rule 1.04 and precedent. *New York Central Railroad Company v. PUCO*, 157 Ohio State 257)?
(1.04)

"Any person, firm, company, corporation or association, mercantile, agricultural or man-

ufacturing society, body politic or municipal corporation, railroad or public utility, may become a party: (d) by entering an appearance at the hearing."

The Supreme Court, in *New York Central Railroad Company vs. PUCO*, 157 Ohio State 257, held that due process requires that any parties affected by any temporary action of the Commission be given a reasonable opportunity to be heard. The Court went on to further hold that no final order could be issued by the Commission without according to the parties affected by such order a reasonable opportunity to be heard. The refusal of the Commission to allow and appearance of the protestants and to allow the protestants to testify and submit evidence in their behalf is a violation of the constitutional right to due process.

(3) Was there error in the examiner's not finding that the question of legal capacity of the transferor to contract with the transferee-assignee was subject to court determination, with such determination being a condition precedent to Commission's continuing jurisdiction herein?

Protestants argue that, *having alleged oral and/or written contracts* with the transferor conditioned upon the failure of transfer to Clift for any reason, the legal capacity of Masters to contract with the substituted transferee was a legal issue subject to court determination. The protestants argue that an order approving the transfer from Masters to Neff (transferee by assignment) would amount to an approval of potential breach of contract on the part of the transferor and therefore, not in the public interest (*Frank Cartage*, Case No. 34,452).



(4) Was there error in finding that the applicants transferor and transferee (assignee) sustained their burden of proof requisite for approval of a transfer (*Frank Cartage*; Case No. 34,452)?

Protestants argue, in accord with their first contention of error, that the testimony submitted on behalf of the transferor by power of attorney was inadmissable under Commission rules and the applicants have failed to sustain their burden of proof thereby.

The first error alleged is the examiner erred in accepting testimony from James Stiverson, who was representing the transferor, under a power of attorney rather than requiring at least a deposition. In support of this proposition, protestant cites Case No. 35,266, *Huntington-Cincinnati Trucking Lines* and Sections 3.02 (C), 3.08, and 1.12 of the Commission's Rules and Regulations.

Section 3.08 is not relevant to this proceeding at all in that it pertains to a continuation of the business by a personal representative, surviving partner, receiver, trustee, or other fiduciary. This proceeding is for the transfer of a certificate not the continuation of the business.

Section 3.02 (C) and *Huntington-Cincinnati Trucking Lines* must be considered together. Section 3.02 (C) states "Any applicant shall appear in person or by corporate officer, upon the date set for hearing. . . . failure of applicants to appear at the hearing is cause for dismissal." Counsel for the protestants cited *Huntington-Cincinnati Trucking Lines* for support of the proposition the applicant must appear in person at the hearing. It would appear that counsel did not read

the entire case. This particular case stated the testimony of the particular substitute witness was "dubious at best" but did not dismiss the application. Furthermore, this case also cited a case in which a substitute witness testified and such testimony was accepted. *Dorothy C. Madrid,* dba *M and M Trucking Co., and Dot Express,* Case No. 4953, Order dated October 4, 1968. The Commission stated Section 3.02 (C) of the Commission's Rules and Regulations does not categorially state that failure of each applicant to appear requires dismissal of the application. The Commission should weigh the factors involved in the case and make a decision on those factors alone. In the case at bar, neither Mr. or Mrs. Masters were physically able to testify at the hearing and the file contains an affidavit from Mrs. Masters prepared after the death of her husband indicating her desire and consent to complete the pending transfer. The file also contains a journal entry from the Probate Court of Monroe County authorizing Mrs. Masters as executrix of her husband's estate to complete the transfer. Final documents submitted and placed in the Commission's file consist of letters testamentary from the Probate Court and a power of attorney granted by Mr. Masters to Mr. Stiverson permitting him to take all actions necessary to transfer this certificate. In view of the circumstances of this case as summarized above, it is this Commission's opinion the examiner's acceptance of the testimony of James R. Stiverson under a power of attorney was a proper and supportable exercise of discretion which should be upheld.

Section 1.12 states "[T]he testimony of a witness may be taken by deposition, at the instance of a party, in any proceeding or investigation before the Public



Utilities Commission." Protestants appear to be of the opinion that this means the deposition of Mr. Masters should have been taken. However, the protestants, in their exceptions to the attorney examiner's report, stated the Commission "should not impose such a strict interpretation of its rules that would create an undue hardship on the applicants". By forcing the deposition to be taken that is exactly what would be happening. A deposition is not the only viable alternative. Here a deposition would create a hardship on the parties as both Mr. Masters and his wife were ill at the time of the hearing with Mr. Masters eventually passing away. Because of these health problems, the most reasonable alternative as stated above was to permit Mr. Stiverson to testify by exercising the power of attorney granted by Mr. Masters.

Protestants further allege error in the examiner's finding that protestants Tonkovich and Dressler had no discernible interest over which the Commission had jurisdiction and that said appearances were untimely and prejudicial. Essentially protestants are arguing they should have been allowed to participate in the hearing or, in the alternative, that the proceedings should have been postponed pending resolution of alleged conflicting contractual claims in a proper forum.

Protestants cite Section 1.04 of the Commission's Rules and Regulations in support of their contentions. That rule states: "Any person, firm, company, corporation, mercantile, agricultural or manufacturing society, body politic or municipal corporation, railroad or public utility, may become a party: (d) by entering an appearance at the hearing." However, this has not been construed to mean that *a mere appearance* at a hearing entitles a party to take part in the proceeding.

In *Schwerman Trucking Co.*, Case No. 3514, in an order dated May 21, 1962 the Commission, called upon to interpret the same language, stated this rule "must be construed to mean that any person, corporation or natural 'having an interest' in the case, controversy, or proceeding may become a party." This requirement of an "interest" is based on the practical consideration that there be some limitations upon the hearing and issues to be decided. The Commission must ultimately make this "interest" determination, however it is the attorney examiner who will be called upon to make the initial decision as to standing based upon "interest".

This brings us to the question of whether or not protestants Tonkovich and Dressler possessed sufficient "interest" at the time of their appearance to warrant a finding of standing to oppose the transfer under consideration at that time.

In this proceeding it is apparent that neither Tonkovich nor Dressler have such an interest in these proceedings. Tonkovich alleges an oral contract with the transferor, and Dressler alleges a written contract with the transferor. That is all they have, mere allegations, and allegations do not make a contract. These parties have not taken any steps to perfect their rights under these allegations. It is not within the jurisdiction of this Commission to decide contract rights, but is the province of an appropriate court of law, and in this situation the protestants have had ample time to seek their appropriate remedy in the proper court. It is not the fault of this Commission that protestants sat on their rights. The Commission is also aware that the attempt of A. L. Dressler to secure a permanent restraining order prohibiting the subject transfer based upon his alleged contractual rights was denied by the



Common Pleas Court in Muskingum County on March 22, 1974. This would seem to raise some substantial question concerning the contract rights of the protestant Dressler. Since there was no offer of proof that any claims had been pursued in a proper forum, then it logically follows that protestants Dressler and Tonkovich exhibited no standing whereby any established right or claim would be affected by the outcome of the subject transfer.

As for the proper time of intervention, the time for these protestants to intervene would be when Clyde G. Clift withdrew from the hearing, and not four months later. They had no interest in the proceedings because they failed to perfect, or even institute action to perfect their alleged contract rights. Protestants should only be permitted to intervene in a proceeding when they have an interest in the proceeding and have made a timely motion to intervene. Protestants should not be permitted to intervene when all they will succeed in doing is disrupt the proceeding the cause unnecessary delays predicated upon allegations of injury to rights which have not been pursued.

Protestants cite *New York Central Railroad Co. v. Pub. Util. Comm.*, 157 Ohio St. 257 (1952) in an attempt to show they were denied due process by not being allowed to participate in the hearing. In the syllabus of that case, the court stated any party affected by temporary actions of the Commission has a right to be heard. However, since these particular protestants have no interest in the proceedings they were not denied due process. Finally, even though they have no interest, the parties were given an opportunity to make a statement for the record and were therefore, not denied due process or prejudiced by not being al-

lowed to participate in a hearing in which they could exhibit no interest supportive of such continuing participation.

The final argument made by the protestants is that there should have been a court determination of the capacity of the transferor to contract and that such determination was a condition precedent to the Commission continuing jurisdiction herein. They also argue that an approval of the transfer to Neff would promote a potential breach of contract by the transferor. In reply to the latter question, in order to have a breach of contract there must be a contract. There has been no proof of any other contract than that before the Commission so the argument is moot and meaningless.

Actually the questions of the legal capacity of the transferor contract has been rendered moot by the demise of Mr. Masters. Because of the obvious evidentiary problems, it would be extremely difficult to attempt to prove his capacity at the time of the initial transfer hearing. The question of his capacity quite possibly was answered when the restraining order sought by Dressler was denied. This Commission as stated does not decide contract rights. The protestants should have sought to perfect their rights under contract and file a timely protest. The fact the protestants failed to do so is not the fault of this Commission. If the Commission were, to grant these requests for continuation until all differing claims were resolved, if indeed there are any left to resolve, it would unnecessarily and severely prejudice the parties hereto.

The Commission, upon review of the arguments put forth by Tonkovich and Dressler as discussed above, finds that such allegations of paramount contractual rights barring a proposed transfer appear seldom before the Commission. In the *Application of Milliron*



*Company, transferor and J. Miller Express, Inc., transferee to transfer Certificate No. 2190-I*, Case No. 73-191-C, an appearance was tendered as an intervenor in opposition to the transfer on the basis of a prospective breach of contract between the transferor and the intervenor. While the reporting examiner permitted the intervenor to participate, the Commission made the following observations at pages 2 and 4 of its order:

> "The reporting examiner correctly found it necessary to disregard all testimony on the contract breach issue for the reason that such an issue is justiciable in a court of law and not before this Commission since this Commission does not have jurisdiction to adjudicate it."
> "As to the intervention of Tajon, Inc., the Commission finds that it should have been denied in the first instance. It has already been noted that the Commission is not the proper forum for the adjudication of a contract dispute. . ."

Further, in the above-quoted transfer, the Commission reviewed the evidence adduced and granted the transfer, overruling the exceptions of Tajon, Inc.

The Commission finds that the conclusions of the reporting examiner in recommending that the instant transfer from Masters to Neff be granted are well made and are hereby upheld. The Commission further finds the exceptions of Tonkovich and Dressler to the examiner's recommendation are not well taken for the reasons set forth herein and should be overruled.

FINDINGS OF FACT:

(1) On September 10, 1973, Sam Masters, dba Masters Transfer Service, transferor, and Clyde G. Clift, transferee, filed a joint application with this Commission to transfer Certificate of Public Convenience and Necessity Nos. 3186-I and 5376-I.

(2) Certificate No. 3186-I, presently in good standing with the Commission, authorizes:

property from all points in Monroe County to all points in the State of Ohio and reverse

(Duplicate authority restriction)

(3) Certificate No. 5376-I, presently in good standing with the Commission, authorizes:

property from and to Barnesville, Ohio, and the territory within a five (5) mile radius therefrom.

(Duplicate authority restriction)

(4) Notice of the filing and pendency of the application was published once a week for three consecutive weeks in *The Monroe County Beacon*, being a newspaper of general circulation in Monroe County, the principal place of business of both applicants.

(5) Public hearing on the above-described application was held on October 16, 1973 at which time the applicant transferee appeared, however, information was received to the effect that the applicant transferor's testimony would be submitted by his attorney in fact under power of attorney due to transferor's illness.

(6) The proposed transfer from Masters to Clift was opposed by Beryl O. Carpenter, Neal Graham and Larry Emery, claiming to be residents of Monroe County attacking the fitness of Clyde G. Clift to hold authority from the Commission.

(7) Public hearing was held on November 1, 1973, at which time James R. Stiverson appeared



as attorney in fact under a power of attorney executed by the ailing and hospitalized Masters, and submitted testimony concerning the transferor's operations, continuing need for service and the motivation for transfer.

(8) Public hearing was held on December 27, 1973 with the following pertinent occurrences:

(a) Commission informed of November 19, 1973, assignment by Clift of all interest in and obligations imposed by the contract for purchase and sale with Masters to Robert Neff and Sons, Inc. (assignment tendered as exhibit).

(b) Commission informed that one A. L. Dressler had filed for temporary and permanent restraining order to prevent Masters, Clift and/or Neff from transfer of certificates and, that temporary restraining order issued by Muskingum County Court of Common Pleas (effective until January 3 ,1974).

(c) Case continued due to parties being bound by terms of restraining order.

(9) Public hearing held on April 11, 1974 with following pertinent occurrences:

(a) Appearance on behalf of one John D. Tonkovich, claiming an oral contract with Masters for purchase of certificates.

(b) Appearances tendered on behalf of one A. L. Dressler, claiming a written contract with Masters for purchase of cer-

tificates which cut of any right of assignment.

(c) Commission informed Muskingum County Common Pleas Court dissolved the temporary restraining order and found no relief warranted on Dressler's claim.

(d) New application reflecting intent to transfer to assignee-transferee Robert Neff and Sons, Inc., placed in Commission file along with new publication in Monroe and Muskingum Counties.

(10) Neither Tonkovich (oral contract alleged) or Dressler (written contract alleged) had pursued lawful resolution and/or establishment of their claims of paramount contractual rights under which they claimed standing to oppose and/or block the pending transfer from Masters to Neff.

(11) The Court of Common Pleas, Muskingum County, dissolved the temporary restraining order issued in December of 1973, and denied A. L. Dressler any other relief prayed in that action.

(12) The hearing examiner ruled that neither Tonkovich (oral contract alleged) nor Dressler (written contract alleged) had exhibited sufficient lawful interest in the outcome of the pending transfer from Masters to Neff to support their continuing participation therein and further ruled that the three residents of Monroe County had no further standing in



light of the November 19, 1973 assignment of interest from Clift to Neff as transferee.

(13) The Commission's file reveals that the application and supporting material submitted to the Commission on April 10, 1974, reflecting the assignment of interest from Clift to Neff as transferee, is in proper form.

(14) The reason for the transfer as stated upon the record is the poor health of Sam Masters rendering him unable to continue service under the authorities.

(15) The record made upon public hearing and the Commission's file reveal that the transferor is in a good financial condition and that the sale of the authorities will not affect the obligations to any creditor.

(16) The record made reveals no outstanding taxes due the State of Ohio from the transferor.

(17) The agreement reveals an $8,050.00 purchase price which has been placed in escrow by the transferee Neff, to be tendered to the transferor upon consummation of the transaction.

(18) The transferee, Robert Neff and Sons, Inc., is an established motor transportation company, holding both inter and intrastate authorities and engaging in various types of transportation business.

(19) The transferee's operations are in good standing with the Commission and Robert Neff and Sons, Inc., possesses sufficient equipment, finance, facilities, experience, ability and knowledge of applicable rules and stat-

utes to receive the subject authorities and render a service pursuant thereto.

(20) The transferee, if the instant application is granted, has no objection to a duplicate service restriction being placed upon its existing authority.

(21) Both the transferor's testimony (by power of attorney) and that submitted on behalf of Robert Neff and Sons, Inc., reveals a continuing use and need for the subject authorities and service thereunder.

(22) The transferee maintains the opinion that the purchase price specified in the contract, to which he has become a party by assignment, is reasonable and said price has been placed in escrow for purposes of consummation of the transaction.

(23) Pursuant to application therefor, Robert Neff and Sons, Inc., was granted temporary authority to conduct operations under the subject authorities on May 14, 1974, with said temporary authority and authorized service thereunder being extended by Commission Entry on several occasions.

(24) On August 7, 1974, the reporting examiner issued a report recommending that the Commission should approve the transfer of Certificate Nos. 3186-I and 5376-I from Sam Masters, dba Masters Transfer Service to Robert Neff and Sons, Inc.

(25) On August 19, 1974, exceptions to the report and recommendation of the attorney examiner



were filed on behalf of John D. Tonkovich and A. L. Dressler, which raised four basic issues with respect to the hearing examiner's treatment of the circumstances presented and rulings adverse to the alleged "interests" of Tonkovich and Dressler.

(26) On September 10, 1974, a reply to exceptions was filed on behalf of the joint applicants, Masters and Neff.

(27) The Commission finds as a matter of fact from public record, that on August 22, 1974, Sam Masters, the transferor herein died.

(28) The Commission's file contained a certified copy of a Journal Entry of the Monroe County Court of Common Pleas, Probate Division, dated February 21, 1975, authorizing Virginia Masters, executrix of the estate of Sam Masters, deceased, to complete the terms of the subject contract for sale of the involved authorities.

CONCLUSIONS OF LAW:

(1) The application to transfer Certificate Nos. 3186-I and 5376-I from Sam Masters, dba Masters Transfer Service to Robert Neff and Sons, Inc., is in proper form and publication has been made as required by law.

(2) The Commission has jurisdiction to hear and decide all issues raised herein pertinent to a proper and lawful transfer of motor carrier authority.

(3) The motivation for the parties seeking transfer is within the best interest of the public

in securing and maintaining the best possible transportation service.

(4) There exists a demonstrated continuing use and need for the authorities involved and service thereunder.

(5) The transferee, Robert Neff and Sons, Inc., is a proper party to which the common motor carrier authority under consideration may be granted.

(6) The acceptance and consideration of testimony submitted under power of attorney on behalf of the ailing party transferor was a proper exercise of discretion on the part of the hearing examiner under the circumstances of this case.

(7) The Commission is not the proper forum for seeking resolution of conflicting claims of contractual rights to a piece of motor carrier authority.

(8) The hearing examiner's ruling that John D. Tonkovich and A. L. Dressler had no standing which would support their continued participation in the instant proceedings was legally proper.

(9) There is a demonstrated continuing use and need for the certificates involved.

(10) The transferee is a property to which the subject certificates may be granted.

(11) The case submitted on behalf of Sam Masters dba Masters Transfer Service and Robert Neff and Sons, Inc., to transfer Certificate Nos. 3186-I and 5376-I, establishes compliance



with the requirements for transfer of motor carrier authority set forth in *Frank Cartage*, (supra).

(12) The appearances of John D. Tonkovich and A. L. Dressler as protestants and/or intervenors in opposition were not well made and should be denied.

(13) The exceptions of A. L. Dressler and John D. Tonkovich to the recommendation of the attorney examiner are not well taken and should be overruled.

(14) The application of Sam Masters, dba Masters Transfer Service and Robert Neff and Sons, Inc., to transfer Certificate Nos. 3186-I and 5376-I is well made and should be granted.

ORDER:

It is, therefore,

ORDERED, That, for the reasons enumerated above, the protests and/or intervention of A. L. Dressler and John D. Tonkovich be, and hereby are, denied. It is, further,

ORDERED, That the exceptions of the protestants and/or intervenors, to the report and recommendation of the attorney examiner, be, and they are hereby, overruled. It is, further,

ORDERED, That this application be, and it is, hereby, granted. It is, further,

ORDERED, That a period of sixty (60) days be, and hereby is, accorded wherein there shall be completed the transfer of Certificate Nos. 3186-I and 5376-I from Sam Masters, dba Masters Transfer Ser-

vice to Robert Neff and Sons, Inc., said transfer to be complete upon full compliance with the following provisions and the issuance of a transferred certificate:

(1) Transferee shall file, with the Commission, the required insurance or bond as provided in Chapter 15 of the Commission's Code of Rules and Regulations.

(2) Transferee shall pay all prescribed taxes on equipment to be operated.

(3) Transferee shall file with the Commission a formal notice of adoption of tariffs and adoption supplements as provided in Chapter 13 of the Commission's Code of Rules and Regulations.

(4) Transferee shall file, with the Commission, new concurrences, if any, and new powers of attorney to replace and supersede those now filed by transferor, as provided in Chapter 13 of the Commission's Code of Rules and Regulations.

(5) Transferor shall file, with the Commission, an interim report (annual report from January 1 preceding transfer to date transfer is complete).

(6) There shall be no diminution of service on the part of the transferee.

It is, further,

ORDERED, That, as hereinbefore set forth, transfer shall be completed within the time limit provided, else this Order shall be null and void. It is, further,

ORDERED, That copies of this Opinion and Order be served, forthwith, certified mail, return receipt requested, upon the parties hereto and upon their counsel. It is, further,



ORDERED, That copies of this Opinion and Order be mailed to all other interested parties.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ C. LUTHER HECKMAN
Chairman

/s/ SALLY W. BLOOMFIELD
Commissioner

Entered in the Journal
May 13, 1976
A true copy:

/s/ RANDALL G. APPLEGATE
Randall G. Applegate, Secretary

# Supreme Court of the United States

**October Term, 1978**

**No. 78-909**

CITY OF CINCINNATI, OHIO,
*Petitioner,*

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
THE CINCINNATI GAS & ELECTRIC COMPANY,
*Respondents.*

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

## BRIEF OF RESPONDENT THE CINCINNATI GAS & ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

### Cases

**Constitutional Provisions and Statutes**



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## BRIEF OF RESPONDENT THE CINCINNATI GAS & ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### QUESTION PRESENTED

Whether two applications for increases in rates for natural gas service provided in areas served by respondent The Cincinnati Gas & Electric Company outside the corporate limits of the City of Cincinnati and a third application for increases in rates for natural gas service by The Cincinnati Gas & Electric Company to customers residing within Cincinnati were mutually exclusive, thereby pro-

hibiting the Ohio Public Utilities Commission from rendering a decision on the former two applications prior to reaching a decision on the third under the principle enunciated in *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945).

## COUNTER STATEMENT OF THE CASE

Over the years respondent The Cincinnati Gas & Electric Company (hereinafter "CG&E") has followed a practice of negotiating ordinance rate contracts, setting rates for gas and electric service, with many municipalities throughout its service area, pursuant to Article XVIII, Sections 4 and 5, of the Ohio Constitution (Respondent PUCO's App., p. 18). With respect to some other municipalities and unincorporated areas, its rates have been set by the Public Utilities Commission pursuant to Ohio Revised Code, Section 4909.18 *et seq.* (Petitioner's App. H, pp. 94a-97a). Owing to variables in the negotiating process and to differing ordinance dates, CG&E's rates for the same kind and class of service varied widely throughout its service territory. As a consequence, prior to the relevant proceedings below, CG&E had in effect six tariff schedules for natural gas service, varying in amounts solely by reason of political boundaries.

In September, 1974, CG&E filed an application with the Commission, styled Case No. 78-581-GA-AIR, for an increase in rates for gas service to customers in those territories that had previously been subject to the Commission's jurisdiction (*i.e.*, where ordinance contracts had not been or could not, under Ohio law, be negotiated). Subsequently, on March 25, 1975, CG&E filed Case No. 75-205-GA-AIR for an increase in certain rates for service to customers in the City of Cincinnati, rates previously fixed by ordinance contract. Finally, in August, 1975, CG&E filed a third application, styled Case No. 75-641-GA-AIR, for an increase in rates to customers in some sixty-three municipalities, rates previously fixed by municipal ordinances. The three cases together covered all of CG&E's retail natural gas sales.[1]



Petitioner, the City of Cincinnati (hereinafter the "City"), petitioned the Commission for leave to intervene in Case No. 75-205-GA-AIR (hereinafter the "in-City application") only (Respondent PUCO's App., pp. 21-23), and that petition was granted by the Commission (Respondent PUCO's App., pp. 24-25). By an entry dated June 9, 1976, the Commission consolidated the three applications for purposes of public hearing, and set July 12, 1976, as the date for that hearing (Petitioner's App. I, pp. 99a-102a).

Prior to the public hearing and during the course of the proceedings, discussions were held between the parties with respect to possible stipulation of all or some of the issues and settlement. Contrary to the City's contention (Petition, p. 6 n.6), those discussions were *not* without notice to the City. The City was invited, at the earliest opportunity, to participate but declined. Eventually CG&E, the Commission's Staff, and all other parties participating in Cases Nos. 74-581-GA-AIR and 75-651-GA-AIR (hereinafter the "out-of-City applications") were able to reach agreement and to submit a recommendation to the Commission that, if accepted, would dispose of those cases in their entirety. Consequently, a motion to sever was

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1. Although it is convenient to distinguish these cases in terms of municipalities, it should be noted that No. 74-581-GA-AIR actually included certain customer classes throughout CG&E's entire service area. Historically, service to these customers, principally industrial users, had not been regulated by ordinance, even where other service in a particular municipality had been so regulated.

made, and was subsequently granted by an Opinion and Order of the Commission entered on July 23, 1976 (Petitioner's App. D, pp. 39a-64a). That Order approved the tendered recommendation and settlement agreement and rejected a number of arguments raised by the City, including the arguments raised in this petition.[2] Hearings continued on the in-City application and an Opinion and Order in that case was issued on September 8, 1976 (Petitioner's App. E, pp. 65a-84a).

The City filed an application for rehearing on the out-of-City applications, which the Commission denied by Order dated September 15, 1976 (Petitioner's App. F, pp. 85a-88a). The Commission likewise denied the City's application for rehearing on the in-City application (Petitioner's App. G, pp. 89a-97a).

The City then appealed to the Ohio Supreme Court from the Commission's Orders on both the in-City application and the out-of-City applications. Those appeals were heard together, and the Court affirmed both of the Orders appealed from. 55 Ohio St. 2d 168, 378 N.E.2d 729 (Petitioner's App. A and B, pp. 1a-37a). Among the arguments raised by the City and rejected by the Ohio Supreme Court were the same arguments made in the instant petition. The City's motion for rehearing was also denied (Petitioner's App. C, p. 38a).

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2. The petitioner does not dispute, nor can it, that the Commission was required by Ohio law to decide the in-City application on its own record, notwithstanding the Commission's entry of an Order disposing of the out-of-City applications with which it had been consolidated. *See Lopresti v. Community Traction Co.*, 160 Ohio St. 480, 483, 117 N.E.2d 2, 4 (1954); *Transcom Builders, Inc. v. Lorain*, 49 Ohio App. 2d 145, 149-50, 359 N.E.2d 715, 718-19 (Lorain County 1976). CG&E, therefore by agreeing to the settlement on the out-of-City applications despite the City's refusal to settle on the in-City application, bore the risk that it would not have a uniform rate throughout its service area if the record on the in-City application did not support the establishment of rates in the City at the "uniform" level.



## REASONS FOR DENYING THE WRIT

### THE ONLY QUESTION RAISED BY THE PETITION IS FACTUAL IN NATURE, HAS NO IMPORTANCE OTHER THAN TO THE PARTIES TO THE PROCEEDING BELOW, AND WAS CORRECTLY DECIDED BY THE OHIO SUPREME COURT.

Petitioner the City of Cincinnati ("City") argues that the Ohio Public Utilities Commission denied it due process of law by entering a decision on two applications for natural gas rate increases filed by respondent The Cincinnati Gas & Electric Company ("CG&E") for areas served by CG&E outside the City while reserving CG&E's application for natural gas rate increases to customers within the City for later decision. Citing this Court's decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), the City maintains that the three applications at issue were "mutually exclusive" and that the Commission's decision on the two out-of-City applications rendered its subsequent hearing on the in-City application an "empty thing."

Pursuant to the *Ashbacker* doctrine, in a factual situation where the nature of two applications are such that the granting of one of the applications as a practical matter effectively precludes the granting of the other, the body ruling on the competing applications must decide their merits at the same time. *Ashbacker Radio Corp. v. FCC*, *supra*, 326 U.S. at 330. The *fact* of mutual exclusivity between applications is prerequisite to the applicability of *Ashbacker*. *Id.* at 333; *Washington Utilities and Transportation Comm'n v. FCC*, 513 F.2d 1142, 1165-66 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *Delta Air Lines*,

*Inc. v. CAB*, 497 F.2d 608, 614 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 930 (1974). Where such mutual exclusivity is absent, there is no requirement of a consolidated or comparative hearing on the applications. *B. J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1115 n.4 (8th Cir. 1977); *Great Western Packers Express, Inc. v. ICC*, 263 F. Supp. 347, 350-51 (D. Colo. 1966).

The City is asking this Court to review the *factual* determination made by the Ohio Supreme Court that the three applications at issue were not mutually exclusive. The Ohio Supreme Court based its decision on the City's *Ashbacker* claim on the absence of mutual exclusivity.

> "We do not find, however, that the *Ashbacker* doctrine applies to the instant cause. Under the facts of the *Ashbacker* case, the grant of one station's radio broadcasting application meant the *automatic denial* of the second station's license request. The two applications were mutually exclusive. In the instant cause, the commission's grant of one rate outside the City did not preclude the possibility of a different rate inside the city." *Cinncinnati v. Public Utilities Comm'n*, 55 Ohio St. 2d 168, 170-71, 378 N.E.2d 729, 731-32 (1978) (Petitioner's App. A, p. 4a; App. B, p. 23a) (emphasis by the Court).

Certiorari is customarily not granted to review factual determinations made by lower courts. *E.g., Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). With respect to the particular factual determination germane here, mutual exclusivity of applications, in the thirty-three years since *Ashbacker*, this Court has never issued an opinion addressing the question of whether applications were or were not mutually exclusive in the *Ashbacker* sense, and, as late as



1974, denied a petition for writ of certiorari raising such a question. *Delta Air Lines, Inc. v. CAB*, 497 F.2d 608, 614 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 930 (1974).[3] The instant petition should likewise be denied.

The nature of the City's mutual exclusivity argument further militates against the granting of the writ. The City does not contend that the Commission was required to reach the decision that it did on the in-City application by force of law or because of the impact of its prior decision on the out-of-City applications upon the facts relevant to the in-City application. Rather the City argues that mutual exclusivity should be presumed because the record on the in-City application does not contain substantial evidence to support the Commission's decision and because that decision is consistent with the prior one entered on the out-of-City applications.[4] As a prerequisite to resolving the question of mutual exclusivity, therefore, this Court would have to address the question of whether the record contained substantial evidence supporting the challenged rate decision, a question not only inappropriate for review on certiorari but also of no importance to anyone but the parties to the proceeding below.

The Ohio Supreme Court correctly decided that after entering a decision on the out-of-City applications, the Commission was free to decide the in-City application on its own record, and that substantial evidence on the record supported the Commission's decision on the in-City

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3. The question presented by the petition in *Delta Air Lines, Inc. v. CAB, supra*, is stated in 42 U.S.L.W. 3534 (March 17, 1974).

4. This respondent is aware of no authority supporting petitioner's contention that where two applications are not mutually exclusive in the *Ashbacker* sense, by their nature, mutual exclusivity may nevertheless be presumed from the decisions on the merits of those applications, nor does the authority cited by the petitioner support that contention.

application. 55 Ohio St. 2d at 170-71, 378 N.E.2d at 729, 731-32 (Petitioner's App. A, pp. 4a-5a; App. B, pp. 23a-24a). Accordingly, the instant petition should be denied.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-909

CITY OF CINCINNATI, OHIO,

*Petitioner,*

*v.*

PUBLIC UTILITIES COMMISSION OF OHIO,
CINCINNATI GAS & ELECTRIC COMPANY,

*Respondents.*

## REPLY BRIEF OF CITY OF CINCINNATI, OHIO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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January 26, 1979

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## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

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## REPLY BRIEF OF CITY OF CINCINNATI, OHIO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The City of Cincinnati, Ohio (Cincinnati) submits this reply brief in support of its petition for a writ of certiorari in response to the briefs in opposition of the Public Utilities Commission of Ohio (PUCO) and the Cincinnati Gas & Electric Company (CG&E).

### I.

### A FEDERAL QUESTION IS PRESENTED BY CINCINNATI'S PETITION

The PUCO and CG&E argue that Cincinnati's petition presents no federal question (PUCO Br. 8-11; CG&E Br. 5-8). PUCO alone contends that utility ratepayers have no right to a hearing under the United States Consti-

tution in state administrative proceedings fixing intrastate utility rates and that any right to a hearing for utility ratepayers is strictly statutory, not constitutional (PUCO Br. 8-9). CG&E alone argues that the issue presented is a factual one (CG&E Br. 5-8). Neither PUCO nor CG&E is correct.

Although Cincinnati's right to a hearing before the PUCO is of statutory origin (Ohio R.C. 4909.19, Pet. App. H, pp. 95a-97a), the hearing mandated by the Ohio Legislature must be a fair hearing, consistent with the due process requirements of the Fourteenth Amendment. The Supreme Court of Ohio in its decision recognized the constitutional question (Pet., App. B, pp. 22a-24a).

Contrary to the PUCO's assertion in its first question presented (p. 7) Cincinnati never claimed an unqualified right to the perpetual continuation of a particular rate for gas service. By granting the right to a hearing, the Ohio Legislature has recognized a right or entitlement of ratepayers to a continuation of the then existing rates for utility service until the facts proved at the hearing established that new rates should be prescribed. Until those facts are proven at a hearing, the ratepayers cannot be required to pay more money, i.e., their property, than that required by the application of the then existing rates. Cincinnati's statutory right or entitlement to a fair hearing, and as a concomitant aspect thereof, the right not to have to pay more than the then existing rates, is entitled to the same protection against arbitrary governmental action as were the statutory rights of others to an education, *Goss v. Lopez*, 419 U.S. 565, 572-576 (1975), good-time credits accumulated under state law, *Wolff v. McDonnell*, 418 U.S. 539, 556-558 (1974), non-revocation of parole, *Morrissey v. Brewer*, 408 U.S. 471, 481-484 (1972), a driver's license, *Bell v. Burson*, 402 U.S. 535, 539 (1971), or welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254, 262-264 (1970).



Thus, PUCO's reliance upon general statements in certain lower court decisions to the effect that rate payers have no constitutional right to any fixed rate and, therefore, to a hearing involving a change of rates, "misconceives the nature of the issue and is refuted by prior decisions" of this Court. *Goss v. Lopez, supra,* 419 U.S. at 572. As this Court has said (*Id.* at 572-573):

> The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizens to certain benefits. (Citation omitted.)

Finally, PUCO attempts (Brief at 10) to distinguish *Ohio Bell Tel. Co. v. Public Utilities Comm'n.,* 301 U.S. 292 (1937), cited by Cincinnati at page 15 of the Petition, on the ground that that case involved only the constitutional guarantees afforded a utility, not its ratepayers, against the setting of confiscatory rates. True it is that in *Ohio Bell Tel. Co.* it was the utility which alleged a denial of its consititutional right to a fair and open hearing. Equally true, however, is this Court's statement in that case that the "right to such a hearing is one of the 'rudiments of fair play' assured to *every litigant* by the Fourteenth Amendment as a minimal requirement" (Emphasis supplied; citations omitted.) *Ohio Bell Tel. Co. v. Public Utilities Comm'n, supra,* 292 U.S. at 304-305.

CG&E's contention that only an issue of fact is presented obscures the fact that the three applications for rate increases were separate applications in form only, the result of the historical peculiarities of Ohio law that divides rate jurisdiction between the PUCO and Ohio

municipalities (CG&E Br. 2-3). In fact and in substance they constituted a single case. The PUCO Staff and CG&E recognized this oneness in their settlement negotiations and the fact that the common issues, such as uniform rates in CG&E's entire service area, could only be decided one way. They reached a single agreement. In that agreement they settled the common issues in the three dockets and in the same way. They agreed that rates should be uniform throughout CG&E's service areas. It is that agreement that the PUCO approved. It did it in two steps: first in Cases No. 581 and 641 and second in Case No. 205. The same agreement was presented in two separate stipulations only because Cincinnati had refused to join the surrender.

II.

**A REVERSAL OF THE JUDGMENT OF THE COURT BELOW WILL RESULT IN TANGIBLE RELIEF TO CINCINNATI AND WILL NOT CONSTITUTE MERELY AN ADVISORY OPINION.**

In a somewhat ambiguous argument, PUCO contends that Cincinnati seeks only an advisory opinion from this Court (Brief at 16-17). The short answer is that Cincinnati seeks a reversal of the judgment of the Supreme Court of Ohio, with instructions to the court below to vacate the decisions of the PUCO and to order refunds to Cincinnati and all other customers of the monies collected under the increased rates and charges imposed by CG&E under the unlawful decisions of the PUCO. Until a fair and open hearing is held, the rates prescribed by the PUCO and charged by CG&E are void. "He who decides anything, one party being unheard, though he should decide right, does wrong." *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 807 (D.C. Cir. 1948).



## CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court below reversed, with instructions to vacate the decisions of the PUCO and to order refunds to Cincinnati and all other customers of the monies collected under the increased rates and charges imposed by CG&E under the unlawful decisions of the PUCO.

Respectfully submitted,

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